(1)

90-671

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

EDWARD D. CHRISTENSEN,

PETITIONER,

V.

BRENT D. WARD, ET AL.,

RESPONDENTS.

EDWARD D. CHRISTENSEN,

PETITIONER,

V.

WALTER T. MCGOVERN, ET AL.,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

EDWARD D. CHRISTENSEN
IN PROPER PERSON
387 NORTH 300 EAST
RICHFIELD UTAH, 84701
PHONE: (801) 896 4719

QUESTIONS PRESENTED FOR REVIEW

Whether judges may lawfully declare a defendant employee immune from suit, who has injured another, and has not complied with Public Law 100-694 ?

Whether judges may lawfully dismiss a suit, where injuries have occurred, rather than substitute the United States as the defendant, under Public Law 100-694, Sec. 6(d)(1) and (d)(2), amending 28 U.S.C., Sec. 2679(d) ?

Whether judges may lawfully prohibit a citizen from filing complaints or appeals in Federal Courts, that contain allegations which are supported by competent authority, contrary to rights secured by Amendments 1 and 9 of the U. S. Constitution ?

Whether judges may lawfully prohibit direct or indirect challenges to previous court proceedings, where obvious errors are shown ?

Whether judges may lawfully impose money

sanctions for alleged frivolous appeals, where allegations are supported by law and Supreme Court rulings ?

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EDWARD D. CHRISTENSEN,

Petitioner,

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Respondents.

EDWARD D. CHRISTENSEN,

Petitioner,

v.

WALTER T. McGOVERN, JOHN C. MERKEL, DAVID B. BUKEY, JEAN S. ANDERSON, ROBERT M. TAYLOR, CLIFFORD J. WALLACE, THOMAS TANG, DAVID THOMPSON, EDMUND MEESE, III, KIRK C. LUSTY, JULES G. KORNER, III, JOHN P. MOORE, OLIVER SETH, WAYNE E. ALLEY, MICHAEL L. PAUP, WILLIAM H. REHNQUIST, BYRON R. WHITE, WILLIAM J. BRENNAN. HARRY A. BLACKMUN, THURGOOD MARSHALL, JOHN PAUL STEVENS, ANTHONY M. KENNEDY, SANDRA D. O'CONNOR, ANTONIN SCALIA, AND JOHN AND JANE DOES' 1 THROUGH 100.

Defendants.

All parties are shown in the caption.

OPINIONS BELOW

The opinions of the Courts below are in the Appendix of this Petition, beginning at A-1 (Appendix, page 1)

JURISDICTION OF THIS COURT

The grounds on which the jurisdiction of this Court is invoked are as follows:

The date of the entry of the Order and Judgment sought to be reviewed is June 29 1990.

The date of the Order denying Petition for Rehearing is Aug. 2, 1990.

There is no order granting extention of time in which to petition for a writ of certiorari.

The statutory provinsion believed to confer on this Court jurisdiction to review the Order and Judgment in question by writ of certiorari is 28 U.S.C., Sec. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

CONSTITITIONAL PROVISIONS: Article III, Sec. 2, Article VI, Par. 2, Amendments 1, 4, 5, 7, 9, 10, 13, and 16.

STATUTES: Public Law 100-694, 26 U.S.C. Sections 6012, 6020, and 6201, 28 U.S.C. Sections 453 and 455.

REGULATIONS: Federal Income Tax Regulation Sec. 1.6012-1(5), I.R.S. Delinquent Return Procedures, Sections 5290 and 5291.

STATEMENT OF THE CASES

This action is in the nature of a Petition for Redress for injuries done to Petitioner by government employees. Petitioner has been imprisoned for an alleged crime that did not apply to him, had his property seized by false assessment, and collection procedures which disregarded the law and regulations, and was denied redress when the law and regulations were presented to defendants.

Christensen filed two suits against

said government employees, asking monetary redress and other appropriate relief. One suit was filed in Utah District Court against residents of Utah, the other in Federal Court, under diversity of citizenship. The Ward, et al suit was filed Sept. 7, 1988 and removed to Federal Court on Oct. 12, 1988. The McGovern, et al. suit was filed Sept 29, 1988. Both cases were commingled. Hearing on all motions was held on May 11, 1989. Acting Judge Finesilver issued his Memorandum Opinion and Order on June 1, 1989 (appendix). Motiotion to vacate was filed June 24, 1989 and denied June 27, 1989.

Notice of Appeal, to the United States Court of Appeals for the Tenth Circuit was filed July 25, 1989.

On June 29, 1990 Judges Logan, Moore, and Anderson, of said Court of Appeals, issued an Order and Judgment, and an Order to Show cause why sanctions should

not be imposed on Christensen. On July 5, 1990 Christensen complied with the Order to Show Cause. On July 9, 1990 Judges Logan, Seymour and Anderson issued an Order "To correct the identity of the members of the panel of judges who decided this appeal, the order and judgment and order to show cause issued June 29, 1990" (see Appendix) On July 12, 1990 Christensen filed a Petition for Rehearing, with a request for reconsideration by different judges. On August 2, 1990 Judges Logan, Seymour and Anderson denied the Petition For Rehearing. On August 28, 1990, Judges Logan, Seymour and Anderson issued amended sanctions against Christensen (Appendix) On Oct 3, 1990 Judges Logan Seymour and Anderson ordered, on their own motion, that their Order and Judgment of June 29, 1990 and their amended sanctions be published.

Federal jurisdiction in the case filed

in U. S. District Court is pursuant to Article III, Sec. 2 of the U. S. Constitution and 28 U.S.C., Sec. 1332 (a)(1). Christensen contested federal jurisdiction of the Utah District Court case.

Argument

The writ should be allowed because a United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and has sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Under the doctrine of stare decisis, lower courts are bound by settled decisions of the Supreme Court. Under a judge's oath, (28 U.S.C., Sec. 453) he agrees to perform his duties agreeably to the Constitution and laws of the United States. Under the Cannons of Judicial Ethics, a judge's duty is to apply the law to particular instances (No. 20), to support the federal Constitution, and should fearlessly observe and

apply fundamental limitations and guarantees (No. 3), his conduct should be free from impropriety and the appearance of impropriety, and should avoid infractions of law (No. 4) and should indicate the reasons for his action in his opinions (No. 19). And a judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned (28 U.S.C., Sec. 455).

The above establishes the accepted and usual course of judicial proceedings.

In disregarding the above authorities, both lower courts have so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Courts power of supervision.

Amendment One of the Constitution prohibits Congress from making any law abridging the right of the people to petition the Government for a redress of grievances. Since there is no power delegated to the

United States to deny petitions for redress of grievances, it follows that such power may not be lawfully exercised, according to Amendment Ten. Certainly one of the rights referred to in Amendment Nine is the right to receive redress for injuries. The Supreme Court quoted Blackstone: "... that every right, when withheld, must have a remedy, and every injury its proper redress." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163. Further, Public Law 100-694 provides for substitution of the United States as the party defendant if the public employee is certified as having acted within his scope of employment, and the purpose of the law provides "... while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States." Sec. 2(b).

Each of the above authorities clearly points to the unmistakable conclusion that every injury must have its appropriate

remedy, and that Congress intended the same. The District Court dismissed both suits and the Court of appeals affirmed, leaving Christensen with no redress, and further injury. It is alleged that such is not the accepted and usual course of judicial proceedings.

Although Public Law 100-694 was in effect on Nov. 18, 1988 and hearing was not until May 11, 1989 both lower courts dismissed on grounds of immunity from suit. It is alleged that the theory of immunity from suit is in conflict with the Constitution, as there is no mention of such in the Constution, (see Amendment Ten) and is in conflict with the doctrine of equality and equal treatment under the law (see Declaration of Independence). To argue that one portion of the people, public employees, are immune from suit but all others are not is clearly ludicrous.

It is clear that the purpose of the

certification procedures of Public Law 100-694 is merely to determine who is liable for the injury, the employee or the United States. Procedures provide first, for certification by the Attorney General. If he refuses, the Court may certify. Certainly neither could truthfully certify that an employee had acted within the scope of his employment if such employee had disregarded the law, regulations, procedures or lack of jurisdiction.

Defendants attorneys argue: "... it would make no sense to remand these cases for the purpose of obtaining such certification." In other words it would make no sense to comply with the law. Then the Court of Appeals ruled: "It is unnecessary to determine whether the lack of a formal certification by the Attorney General in addition to the unmistakable position of the Department of Justice in pleadings filed in these actions, prevents the ap-

plicability of 28 U.S.C. Sec. 2671, et seq." Such statement is totally irrational. 28 U.S.C. Sec. 2679(d), which provides for formal certification, is part of 28 U.S.C. Sec. 2671, et seq. Although said statement is sensless, it appears to announce that the court is ruling on the pleadings of the Department of Justice rather than the law. It is alleged that said ruling is a departure fron the accepted and usual course of judicial proceedings.

No certification was ever made.

The Supreme Court ruled: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection." Marbury v. Madison at 163. The above together with the judge's oath, the Cannons of Judicial Ethics and criminal penalties for violation of the laws all point to the

unmistakable conclusion that the law must be followed and every individual must be afforded protection of the laws. The Court of Appeals did not follow the law, and did not afford me protection of the laws.

Christensen presented the law to both lower courts. 26 U.S.C., Sec. 6012, for the years Christensen was imprisoned, states in part: "..., except that a return shall not be required of an individual (other than an individual referred to in section 142(b))- ..." Christensen is not referred to in section 142(b). Christensen was convicted for willful failure to file returns, which were not required. The accepted and usual course of judicial proceedings would be to apply the law, and rule agreeably to the law, under Cannon No. 20, and 28 U.S.C., Sec 453, and to recognize the injury of false imprisonment. Failure to apply the law as it reads, and failure to recognize injuries are both

clear departures from the accepted and usual course of judicial proceedings.

Further, since I was not required to make returns, I.R.S. agents lacked authority to execute returns for me under 26 U. S. C. , Sec. 6020(b) Said section reads in part: "If any person fails to make any return ... required by any internal revenue law or regulation made thereunder ..." By express words of the law, the Secretary may only execute returns for persons required to make returns. Further, I.R.S. Delinquent Return Procedures, sections 5290 and 5291 refer to IRC 6020(b) and list the forms which may be executed. Form 1040 is not listed. Further, Federal Income Tax Regulations, Sec 1.6012-1 (5) requires a power of attorney whenever a return is made by an agent. No power of attorney was given by Christensen. Again, 26 U.S.C., Sec. 6201(a)(1) provides for assessment of taxes from returns made

under this title. The words "made under this title" clearly mean made according to the foregoing sections, regulations and procedures. None were so made, therefore, the assessment made against Christensen is fraudulent, and the seizure of property was unlawful.

The accepted and usual course of judicial proceedings would be to apply the law to the particular instances, under Cannon No. 20, and recognize that defendants had failed to afford Christensen protection of the laws and regulations, and thus injured him. (see stare decisis) The Court of Appeals again failed to afford Christensen protection of those same laws, which is clearly a departure from the accepted and usual course of judicial proceedings.

Christensen even explained the reason why the law (26 U.S.C., Sec. 6012) excepts individuals from making income tax returns, citing Marbury v. Madison, at 180, that a

law must be pursuant to the Constitution to have the rank of supreme law, and a law repugnant to the Constitution is void. Obviously there is no provision in the Constitution that even mentions making returns of income. Therefore, a law requiring such would not be pursuant to the Constitution. On the other hand, if such a law did exist it would clearly be repugnant to the privacy provisions of the Fourth Amendment, (see Warden v. Hayden, 387 U.S. 294, 304) and would require labor which may be against the will, to keep records and many hours preparing complicated returns. Such labor is prohibited by Amendment Thirteen,(involuntary servitude) if it is against the will. (see definition of involuntary servitude, Black's Law Dictionary).

Again, the accepted and usual course of judicial proceedings would be to accept the Constitution as it reads, its limit-

ations and guarantees, its prohibitions, Supreme Court rulings on its meanings, and to rule agreeably to the Constitution and laws of the United States (supra). Rejecting or disregarding the Constitution and laws of the United States in favor of their own rulings and other rulings which are not pursuant to the Constitution is clearly a departure from the accepted and usual course of judicial proceedings.

The Court of Appeals mentions finality of previous judgments and court proceedings. Here again, the Constitution is silent on the subject of finality. The theory of finality of any judgment that conflicts with the Constitution, or the law, would undermine each respectively, and would make a mockery of the purpose to establish justice. It supports the underworld practice of getting away with what is wrong, and flys in the face of redress of grievances. A judgment or

proceeding is obviously final only when it is in agreement with the Constitution and laws, and nothing is left open to dispute. Such is in agreement with the definition of final decision. "One which leaves noting open to further dispute and which sets at rest cause of action between parties." Hammond v. Boston Terminal Co., 295 Mass. 566, 4 N.E.2d 328. Errors in past proceedings, concering Christensen, and in this proceeding are obvious, merely by reading the law. The accepted and usual course of judicial proceedings would be to apply the law to the instance and correct the errors, not to declare them final with the errors remaining. Even a suggestion that a proceeding is final without showing that it is in agreement with the Constitution and laws is a departure from the accepted and usual course of judicial proceedings.

No one has ever shown that any of the

proceedings, involving Christensen, are in agreement with the Constitution and laws. When the Constitution and law is presented, the defendants and lower courts, in these cases, use evasive tactics to avoid the Constitution and law, calling the arguments frivolous or claiming immunity from suit. Such is clearly a departure from the accepted and usual course of judicial proceedings.

SANCTIONS

The Court of Appeals imposed sanctions against Christensen. Here again the Constitution is silent on power to impose sanctions, and the Tenth Amendment provides that powers not delegated to the United States by the Constitution are (not possessed). To exercise a power not delegated to the United States offends the Constitution and makes a mockery of a judge's oath to support the Constitution, and to perform his duties agreeably to the Con-

stitution. The judges of the Court of Appeals exercised the alleged power.

The Court of Appeals implies that Christensen's allegations are frivolous, but there is no direct ruling that they are indeed frivolous. Christensen denied the same. The allegations have not been contradicted, and indeed cannot be. It is alleged that imposing sanctions without first showing constitutional authority to do so, without proving the allegations are indeed frivolous, by showing the correct authority and then making a direct ruling that an allegation is frivolous is a clear departure from the accepted and usual course of judicial proceedings.

Sanction No. 2 prohibits Christensen from filing any complaint in the United States District Court for the District of Utah or any appeal in the Court of Appeals for the Tenth Circuit that contains the same or similar allegations to the ones set forth

in my complaints and other pleadings in the cases at bar (including any direct or indirect challenge to the previous court proceedings or judgments referred to in their order and judgment of June 29, 1990). Such sanction amounts to censorship of the worst kind, it conspires against and restricts my right to freedom of speech and expression, to access to the courts, and to redress my grievances, under the First Amendment. Again the Constitution is silent on the power to so restrict, and actually prohibits such. Certainly if burning the American Flaf is freedom of expression, filing allegations in court supported by the Constitution and Supreme Court rulings is also freedom of expression. Following, are some authorities: "we shall find that the censorial power is in the people over the government, and not in the government over the people." 4 annals of Congress 934 (1794). "The people shall not be deprived

or abridged of their right to speek, to write or otherwise to publish anything but false facts affecting injuriously the life, liberty, property, or reputation of others or affecting the peace of the confederacy with foreign nations." Jefferson's suggested free speech free press clause, 15 Papers op. cit. 367. "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963) Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." Organization for a Better Austin v. Keefe,402 U.S. 415, 419. "I disapprove of what you say, but I will fight to the death your right to say it." Attributed to Voltaire.

On the subject of access to the courts, the District Court ruled (Constitution guarantees access rather than success)

The Court of Appeals affirmed and then imposed sanctions restricting access to the courts. Such is alleged to be irrational.

It is alleged that access to the courts is a right referred to in the Ninth Amendment. Such being the case, the Court of Appeals had no authority to impose any sanction abridging the right in any way.

Again, the Court of Appeals prohibits any direct or indirect challenge to previous court proceedings or judgments. No grounds are given, however the Court probably relies on the theory of finality, supra. It is alleged that it is my right to challenge court proceedings and judgments until they are completely in agreement with the Constitution, laws, regulations and procedures under the Ninth Amendment. Such being the case, the Court of Appeals again had no authority to impose a sanction abridging said right in any way.

The Supreme Court has ruled: "Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them." Miranda v. Arizona, 384 U.S. 436, 491.

Said citation is in Christensen's Memorandum To Show Cause why sanctions should not be imposed on him. It was disregarded.

The Court of Appeals also imposed money sanctions against Christensen, in this action and for an alleged frivolous appeal in a previous appeal where tax law was presented. Christensen argued that his appeal was not frivolous, citing the definition of a frivolous appeal from Black's Law Dictionary. (Treat v. State ex rel. Mitton, 121 Fla. 509, 163 So. 883.) I also cited the Supreme Court: "And if the doctrine of stare decisis has any meaning at all, it requires that the people in their everyday affairs be able to rely on our decisions and not be needlessly penalized for such

reliance." United States v. Mason, 412 U.S. 391, 399-400, citing Cf. Flood v. Kuhn, 407 U.S. 258, 283 (1972); Wallace v. M'Connel, 3 Pet. 136, 150 (1839). All was disregarded, and sanctions were imposed.

Certainly appeals citing the law and Supreme Court decisions are not frivolous, unless the authorities cited are also frivolous.

The reasoning of the Court of Appeals is now clear to me, and obvious. The judges realized what the law said, realized that it excepted individuals from making income tax returns, realized that if they ruled correctly on the law that it would embarrass the I.R.S. and impede tax collection and would give grounds for many law suits. Said judges, like the defendant judges and justices, obviously decided to corrupt the judicial system by covering up wrongdoing rather than perform their duties agreeably to the Constitution and laws of the United

States, as their oaths require. Such is obvious from their sanction prohibiting me from filing any complaints or appeals containing allegations that the law means what it says.

Prohibiting me from bringing allegations of wrongdoing into the courts is ludicrous, considering that the government has a whistle blowers program to reward persons for reporting wrongdoing.

Again it is alleged that the accepted and usual course of judicial proceedings would be to accept and apply the law and Supreme Court rulings to all appeals, and maybe even to reward citizens for bringing wrongdoing to the attention of the courts, rather than cover up wrongdoing and impose sanctions on a combat veteran that would reduce him to the status of a negro before the Civil War, in respect to redress.

It is alleged that the sanctions against free access to the courts and freedom of

expression, refusal to afford me protection of the laws and the right to redress my grievanced are all conspiracies against my rights as a citizen, under 18 U.S.C. Sec. 241.

There is no direct ruling, in either lower court, that Christensen was not injured. It is alleged that such a ruling is the only ground for dismissal of a suit for redress of injuries, considering the absence of any delegated power to deny redress and the Supreme Court ruling that every injury must have its proper redress.

The effect of the Court of Appeals Order and Judgment implies: "We don't care if we sent you to prison unlawfully, or that we seized more than $220,000 worth of property by disregarding the law, regulations and procedures. You cannot have the property back, nor any other redress, because our decisions are final, and you can't sue us because we are government employees and

are immune from suit without any formal certification. We will not substitute the United States as the party defendant, but we will impose sanctions against you to diminish your rights and to take more money from you, for bringing allegations of wrongdoing into the courts." It is alleged that such is a departure from the accepted and usual course of judicial proceedings.

The District Court failed to provide a jury trial, and the Court of Appeals affirmed. Jury trial was demanded. Considering that there is no provision in the Constitution delegating exclusive power to courts to decide redress of injury cases, and that, as here, the judges of both the District Court and the Court of Appeals had a personal interest that could be substantially affected by the outcome of the proceeding, (immunity of themselves from suit) (see 28 U.S.C. Sec. 455(b)(5)(iii) and the judges should avoid the appearance of im-

propriety (Cannon No. 4) it is alleged that the accepted course of judicial prodeedings would have been to provide a jury.

Finally, it is alleged that the impartiality of the judges of the Court of Appeals might reasonably be questioned. They did not disqualify themselves in this proceeding, pursuant to 28 U.S.C. Sec. 455 (a) nor (b)(5)(iii).

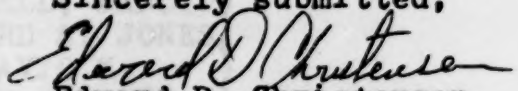
The defendant Justices should disqualify themselves, pursuant to 28 U.S.C. Sec. 455 (b)(5)(i) and (iii).

CONCLUSION

Certiorari should be allowed because a Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and has sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision, and to restore some integrety to the judicial system.

Denial of this petition will imply that this Court finds that the Court of Appeals has not departed from the accepted and usual course of judicial proceedings, and that this Court is satisfied with the existing integrety of the judicial system.

Sincerely submitted,



Edward D. Christensen

In Proper Person

Dated Oct. 18, 1990

APPENDIX FOLLOWS

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

EDWARD D. CHRISTENSEN, Plaintiff-Appellant, v. BRENT D. WARD, C. WILLIAM RYAN, TENA CAMPBELL, RANDY G. DURFEE, RICHARD A. JONES, BRUCE JENKINS, DAVID K. WINDER, DAVID SAM, CALVIN GOULD, DANIEL A. ALSUP, RONALD N. BOYCE, CAROL FAY, D. E. PECORELLA, FRANK PRITCHETT, LINDA S. JERNIGAN, LAWNIE C. MAYHEW, DENNIS REES PACKARD, AND JOHN and JANE DOES 1 through 100, Defendants-Appellees.	No. 89-4099 (D.C. No. 88-C-934) District of Utah
EDWARD D. CHRISTENSEN, Plaintiff-Appellant, v. WALTER T. MCGOVERN, JOHN C. MERKEL, DAVID B. BUKEY, JEAN S. ANDERSON, ROBERT M. TAYLOR, CLIFFORD J. WALLACE, THOMAS TANG, DAVID THOMPSON, EDWIN MEESE, III, KIRK C. LUSTY, JULES G. KORNER, III, JOHN P. MOORE, OLIVER SETH, WAYNE E. ALLEY, MICHAEL L. PAUP, WILLIAM H. REHNQUIST,	No. 89-4100 (D.C. No. 88-C-0883) District of Utah

BYRON R. WHITE, WILLIAM J. BRENNAN, HARRY A. BLACKMUN, THURGOOD MARSHALL, JOHN PAUL STEVENS, ANTHONY M. KENNEDY, SANDRA D. O'CONNOR, ANTONIN SCALIA, and JOHN and JANE DOES 1 THROUGH 100,

Defendants-Appellees.

ORDER AND JUDGMENT*

Before, LOGAN, SEYMOUR and ANDERSON, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

These cases are another chapter in Mr. Christensen's quarrel with the government

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

over federal taxes, including his conviction and imprisonment for failure to file returns beginning in 1972, the subsequent assessment of taxes against him, and the collection of his liabilities through seizure and sale of property. Having had or, in some instances, having waived his day in court on the merits of both civil and criminal proceedings against him, all without success, Mr. Christensen has now sued almost everyone in the government who has disagreed with him, from the Supreme Court to IRS agents. One suit was filed in state court and removed to federal court. The other suit was filed in federal court. The district court opinions filed on May 8 and June 2, 1989, copies of which are attached hereto, identify the parties sued and describe and address Mr. Christensen's contentions in detail. For the reasons set forth in the district court's opinion of June 2, 1989, the

court granted the respective defendants motion to dismiss pursuant to Fed R. Civ. P. 12(d) and 56.

On appeal Mr. Christensen raises the following issues:

"1. Whether Case No. 88-C-0934J was properly removed from State Court to Federal Court?

2. Whether acts of Defendants was (sic) properly certified by the Attorney General, as within scope of duty?

3. Whether dismissal without jury trial was error?

4. Whether bias in the District Court denied Christensen due process of law?

5. Whether dismissal of Christensen's cases was lawful?"

We affirm the decision of the district court in these cases substantially for reasons, and on authorities, contained in the district court's opinions attached hereto. It is unnecessary to determine

whether the lack of a formal certification by the Attorney General in addition to the unmistakeable position of the Department of Justice in pleadings filed in these actions, prevents the applicability of 28 U.S.C. Sec. 2671, et seq. Based on the allegations of the complaints the defendants are clearly immune from suit. Mr. Christensen's Seventh Amendment right to a jury trial was not abridged, because, as explained in the district court's opinions, the complaints failed as a matter of law to present an issue for trial. See Fed. R. Civ. P. 12(b) and 56. Finally, the allegation of bias against the district judge, citing 28 U.S.C. Sec. 455, lacks merit for multiple reasons including the fact that it is based essentially on the improper ground that the district court disagreed with Mr. Christensen's contentions, and ruled against him. See. Wilmer v. University of Kansas, 848 F.2d 1023

(10th Cir. 1988), cert. denied, 109 S. Ct. 1989. The conclusory allegation of lack of due process fails to add any additional dimension to the issue.

The government has requested sanctions for a frivolous appeal, and Mr. Christensen has had an opportunity to respond in his reply brief. Clearly, Mr. Christensen's argument concerning the absence of a certificate by the Attorney General is not frivolous, although not depositive of any issue before us. However the basic rationale underlying Mr. Christensen's actions and arguments, both below and in this court, compels our attention because he has been unsuccessfully reurging that same rationale in the courts, in one guise or another, since the 1970's.

Mr. Christensen believes that he has no obligation to file income tax returns, that federal employees have no authority to pursue the collection of the tax, and that

federal courts have no constitutional grant of jurisdiction relating to such matters. Examples of his arguments in the cases before us are illustrative:

"A law requiring individuals to file returns of their income, private financial information, with public employees would be in conflict with both the Fourth and Thirteenth Amendments of the U. S. Constitution." Reply Brief of Appellant at 6.

"Those who would cite the Sixteenth Amendment are destitute of mentality because the power to lay and collect taxes, as provided in the Sixteenth Amendment, is totally different from the power to require individuals to report their private financial information to government employees." id. at 5.

"Defendants were neglegent in failing to research the law, which would have revealed that the income Tax filing requirements did not apply to Plaintiff ..." Complaint, R.

Vol. II, Tab I at 3 par.9

"Defendant Sam violated the liberty provision of the Constitution ... by finding a liability without citing a law making Plaintiff liable for the income tax, which there is none." Memorandum in Support of Motion to Vacate Memorandum Opinion, Order and Judgment, R. Vol. II, Tab 26 at 6-7.

"The power to require Edward D. Christensen to make income Tax returns is not delegated to the United States by the Constitution, nor is it reasonably to be implied from the power to lay and collect Taxes, an entirely different subject." Memorandum and Conclusions of Law in Support of Motion to Vacate Sentence, January 9, 1986, R. Vol. I, Tab 12 at 13.

"The United States had no standing in Court ... This Court (United States District Court for the Western District of Washington) had no jurisdiction." id at 12.

"The United States is not a named party to

this action and its sovereignty, which is limited to the seat of government, federal enclaves, possessions and territories, is not relevant to this action." Objections to Motion to Dismiss and Motion for Summary Judgment, R. Vol I, Tab 12 at 8.

"The injuries complained of in Case No. 10339 did not ocur (sic) on property ceeded (sic) to the U.S. by the State of Utah, therefore the U.S. District Court does not have exclusive jurisdiction over the case." Objections to Petition for Removal, R. Vol. II, Tab 4 at 2.

"Further, this Court must have jurisdiction over the persons. Neither the Plaintiff nor any of the Defendants live on a federal enclave in the State of Utah where the United States has exclusive territorial jurisdiction, therefore this Court lacks jurisdiction over all persons." Id. at 3.

The only controversy that federal courts may consider between citizens of the same

State is the one 'between citizens of the same State claiming lands under Grants of different States' and that does not apply to Plaintiff's case. (See Article III of the Constitution) Therefore Congress cannot confer jurisdiction of federal courts to determine controversies between citizens of the same state, other tham the one case above mentioned, according to Hudson and Goodwin supra." Id. at 4.

As indicated above, Mr. Christensen had an opportunity to test those or similar arguments on the merits in his criminal case, Tax Court case and collection cases. The history of his litigiousness on the point includes the following.

With respect to his criminal conviction, Mr. Christensen knowingly waived his right to a direct appeal. Transcript of proceedings in No. CR77-276S, R. Vol. I, Tab 12, at p. 2, 4. Thereafter, he pursued collateral challenges to that conviction on three

seperate occations. By an order entered on October 17, 1978 in Civil No. C78-560L, Christensen's motion under 28 U.S.C. Sec. 2255 to vacate, set aside or correct his sentence was denied. By an order entered on November 13, 1978 in Civil No. 669L, Christensen's second motion under 28 U.S.C. Sec. 2255 for the same relief was denied. A third motion purportedly under Fed R. 60 (b), for the same relief, was filed in 1986 and denied on October 23, 1986. See United States v. Christensen, (W.D. Wash. Oct. 23, 1986)(order to dismiss); R. Vol. I, Tab 12. All of the foregoing numbers refer to dockets in the United States District Court for the Western District of Washington.

The Tax Court filed its decision upholding taxes and penalties against Mr. Christensen on November 22, 1982. Christensen appealed to this court which dismissed the appeal for failure to prosecute. Christensen v. Commissioner, No.

83-1227, slip op. (10th Cir. Aug. 17, 1983). Christensen then petitioned for a writ of certiorari to the United States Supreme Court which denied the petition. 465 U.S. 1037, (1984). Thus, the Tax Court decision became final and unreviewable. Yet, almost four years after the judgment was entered, Christensen filed a motion in the Tax Court to vacate the judgment. In his motion he reasserted his original claims. The Tax Court denied the petition. Christensen then appealed once again to this court which affirmed the Tax Court and imposed sanctions in the amount of $3,383.79 for filing a legally frivolous appeal. Christensen v. Commissioner, No. 86-2788, slip op. (10th Cir. Dec. 23, 1987). To date those sanctions remain unpaid.

In addition to the appeals just listed, Mr Christensen has filed five other appeals in this court, and one in the Ninth Circuit, all relating to his federal income tax con-

troversy: United States v. Christensen, No. 87-2158, slip op. (10th Cir. Feb. 24, 1988) (appeal dismissed for lack of jurisdiction) United States v. Christensen, No. 84-2459, slip op. (10th Cir. March 4, 1985) (affirming judgment of the district court directing sale of 1,293 silver dollars in partial satisfaction of Christensen's tax liabilities), cert. denied, 475 U.S. 1018 (1986); Christensen v. United States, No. 84-2503, slip op. (10th Cir. March 4, 1985) (affirming judgment of the district court denying Christensen's motion to vacate two writs of entry pursuant to which I.R.S. Agents seized personal property in partial satisfaction of Christensen's tax liabilities), cert denied, 475 U.S. 1018; Christensen v. Commissioner, No. 80-2302, slip op. (10th Cir. May 7, 1981) (denying Christensen's Petition for a Writ of Mandamus against the Commissioner of Internal Revenue and the Chief Judge of the Tax Court);

Christensen v. Commissioner, No. 80-1065, slip op. (10th Cir. Jan. 26, 1981) dismissing an appeal from the Tax Court); and United States v. Christensen, 831 F.2d 303 (9th Cir. 1987), cert denied, 108 S. Ct. 1595 (1988).

Now we have before us yet again Christensen's persistant attack on these final judgments, using the same arguments he lost on originally to support a claim that judges and employees in the executive branch were wrong on the law. Summarizing his main thesis, Mr Christensen states in his reply brief:

"During the years that Defendants injured Christensen, 26 U.S.C., Sec. 6012 excepted individuals from making returns (see record). This was brought to the attention of Defendants McGovern, Anderson, Taylor, Wallace, Tang, Thompson, Korner, III, Moore, Seth, Alley, Paup, Rehnquist, White, Brennan, Blackmun, Marshall, Stevens,

Kennedy, O'Connor, Scalia, Ward, Ryan, Campbell, Jenkins, Winder, Sam, Gould, Boyce, Lusty, and Fay. All disregarded it, which denied Christensen his right to redress his grievances."

Mr. Christensen further states:

"Defendant McGovern (Judge, U.S. District Court) violated the Constitution by depriving Plaintiff of his liberty (imprisonment) without court jurisdiction and without crime that applied to him. He did not secure the blessings of liberty to Plaintiff. And when his error was brought to his attention, he denyed Plaintiff redress of his grievances. All judges and justices in the appeals Courts denied Plaintiff redress of grievances without citing constitutional authority to so deny, which there is none. Such acts are violations of the Constitution, by usurpation. Defendant Jenkins (Judge, U.S. District Court) violated the constitutional purpose

to establish justice by authorizing the seizure and sale of 1293 silver dollars belonging (sic) to Plaintiff when he knew that Plaintiff had been falsely convicted and without jurisdiction. Defendant Winder (Judge, U.S. District Court) violated the constitutional purpose to establish justice and the purpose to secure the blessings of liberty to Plaintiff when he affirmed the seizure warrants issued by Defendant Gould (U.S. Magistrate) without citing a law that made Plaintiff liable for the income tax. By relying on a false alleged assessment both Defendants Gould and Winder violated the liberty provision of the Constitution by denying Plaintiff protection of the laws. Defendant Sam (Judge, U.S. District Court) violated the liberty provision of the Constitution by denying Plaintiff protection of the laws, by rejecting numerous Court decisions which has established that federal courts have no

jurisdiction beyond that spelled out in the Constitution, by accepting a suit against Plaintiff for an alleged assessment that could not have been made according to law, by taking cognizance of a second suit based upon the same false alleged assessment for the same amount after more than $200,000 worth of property had been seized and sold in the Gould and Winder action and by finding a liability without citing the Gould and Winder action and by finding a liability without citing a law making Plaintiff liable for the income tax, which there is none. Then when Plaintiff had proved that he had paid three times the per capita taxes for his entire life, to that time, Defendants Boyce (U.S. Magistrate) and Sam disregarded it, all in violation of the justice provision of the Constitution. Defendants Boyce and Sam violated the Fourth Amendment of the Constitution by ruling that it did not protect Plaintiff

from deposition clearly contrary to the absence of any words in the Fourth Amendment which could be so construed. Said act violated Plaintiff's right to protection of the law and violated the liberty provision of the Constitution, supra.

I.R.S. employees and Defendant Korner (Judge, U.S. Tax Court) violated the justice and liberty provisions of the Constitution and also statutes of the United States when they established a false liability against Plaintiff contrary to title 26 U.S.C. and then made a false assessment from said false liability, all without citing any law making Plaintiff liable for the income tax. Defendant Kohner (sic) again violated the Constitution by denying Plaintiff redress of grievance when he stamped Plaintiff's motion to vacate his Memo "DENIED" where proof of his error was clear." Motion to Vacate Memorandum Opinion and Order of June 1, 1989 and

Judgment of June 8, 1989. R. Vol. II, Tab 26 at pp. 6-7.

It is apparent from the history of this litigation that Mr. Christensen will not accept the judgment of the courts. The cases before us are not only another example of the fact, they yield insight into Mr. Christensen's thinking. The district court patiently explained its reasoning, with supporting authority, in two opinions running thirty pages in length. In response, Mr. Christensen characterizes the cases cited against him as "garbage decisions" and with respect to the laws in question he states: "Such laws, for lack of a better term, are 'garbage laws' which corrupt the law books and undermine those laws which are pursuant to the Constitution. The same is true of Rules and court decisions which are not pursuant to the constitition." Brief of Appellant at 15-17.

The district court did not impose sanctions against Mr. Christensen, but warned

him that he is "edging toward that line where sanctions are warranted for frivolous insupportable suits." R. Vol. II, Tab 24 at 23. We think Mr. Christensen has crossed that line, especially since he is reurging positions which we have previously determined to be frivolous, and for which we imposed sanctions. He is clearly determined to continue to litigate the same arguments which have been repeatedly rejected, by simply repackaging those arguments and adding new defendants, This court has power to impose sanctions such as costs, attorney fees and double costs for the filing of frivolous appeals, Fed. R. App. P. 38, and the inherent power to impose sanctions that are necessary to regulate the docket, promote judicial efficiency, and most importantly in this case, to deter frivolous filings. VanSickle v. Holloway, 791 F.2d 1431, 1437 (10th Cir. 1986). See also Tripati v. Beaman, 878 F.2d 351, 353

(10th Cir. 1989). As in VanSicle v. Holloway, we think that the following sanctions are appropriate: (1) Double costs are imposed against Christensen; (2) Christensen is prohibited from filing any further complaints in the United States District Court for the District of Utah, or any appeals in this court, that contain the same or similar allegations as those set forth in his complaints and other pleadings in the cases at bar (including any direct or indirect challenge to the previous court proceedings or judgments referred to herein), and the clerks of those courts are directed to return any such complaints to Christensen without filing; and (3) Christensen shall pay to the Clerk of the United States Court of Appeals for the Tenth Circuit $500.00 as a limited contribution to the United States for the cost and expenses of this action.

Although Mr. Christensen has already

had an opportunity to respond to a request for sanctions, he has not been able to address the spicific sanctions proposed herein. See Bradley v. Campbell, 832 F.2d 1504 (10th Cir. 1987).

Accordingly, the clerk is directed to issue an order requiring Christensen to show cause why the above sanctions should not be imposed. Mr. Christensen's response will be limited to five pages. If the response is not received by the clerk within ten days from the filing of this opinion, the sanctions will be imposed. See VanSicle v. Holloway, 791 F.2d at 1437.

Within 14 days of the date of this order appellees shall file an itimized and verified bill of costs with proof of service. The judgment of the district court entered in Nos. 89-4099 and 89-4100 are AFFIRMED. The mandate shall issue forthwith

ENTERED FOR THE COURT

Steven H. Anderson
Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

Civil Action No. 88-C-0883-G

EDWARD D. CHRISTENSEN,

Plaintiff,

v.

WALTER T. McGOVERN; JOHN C. MERKEL; DAVID B. BUCKEY; GENE S. ANDERSON; ROBERT M. TAYLOR; CLIFFORD J. WALLACE; THOMAS TANG; DAVID THOMPSON; EDWIN MEESE, III; KIRK C. LUSTY; JULES G. KORNER, III; JOHN P. MOORE; OLIVER SETH; WAYNE E. ALLEY; MICHAEL L. PAUP; WILLIAM H. REHNQUIST; BYRON R. WHITE; WILLIAM J. BRENNAN; HARRY A. BLACKMUN; THURGOOD MARSHALL; JOHN PAUL STEVENS; ANTHONY M. KENNEDY; SANDRA D. O'CONNOR; ANTONIN SCALIA; and JANE and JOHN DOES 1 through 100,

Defendants.

Civil Action No. 88-C-0934-J

EDWARD D. CHRISTENSEN,

Plaintiff,

v.

BRENT D. WARD; C. WILLIAM RYAN; TENA CAMPBELL; RANDY G. DURFEE; RICHARD A. JONES; BRUCE JENKINS; DAVID K. WINDER; DAVID SAM; CALVIN GOULD; DANIEL A. ALSUP; RONALD N. BOYCE; CAROL FAY; D. E. PECORELLA; FRANK PRITCHETT; LINDA S.

JERNIGAN; LAWNIE C. MAYHEW; DENNIS REES PACKARD; and JOHN and JANE DOES 1 through 100,

Defendants.

MEMORANDUM OPINION AND ORDER

Sherman G. Finesilver, Chief Judge[1]

These two cases are before the court on motions to dismiss, filed by the United States Department of Justice on behalf of the various defendants, pursuant to Rules 12(b) and 56 of the Federal Rules of Civil Procedure. Plaintiff filed a motion for summary judgment in Christensen v. McGovern, et al..

The litigation arises from plaintiff's conviction for failure to file income tax and subsequent tax assessments, levies and seizures of real and personal property. As a result of these criminal and civil tax matters, plaintiff served a two year prison sentence and forfeited a farm, farm equip-

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[1]United States District Court for the District of Colorado, by designation.

ment and 1293 silver dollars. Defendants presided over, prosecuted, or otherwise participated in the actions against plaintiff. Defendants are Justices of the Supreme Court of the United States, several judges of the United States District Courts, Tax Court, and Court of Appeals, attorneys of the Internal Revenue Service, and Department of Justice, United States Attorneys, and several agents of the Internal Revenue Service. Plaintiff alleges that negligent research and application of the law on the part of twenty-three (23) federal justices, judges, and magistrates, twelve (12) government attorneys, and six (6) Internal Revenue Agents led to the false prosecution of a tax crime before a court lacking jurisdiction, false assessment documents, false levies, and the wrongful seizure of real and personal property. The complaints in both cases allege liability in common law tort

for negligent breach of a federal employee's duty to fully and faithfully execute the laws of the United States. Plaintiff seeks economic and non-economic damages.

Christensen v. McGovern, et al., was filed September 29, 1988, in the United States District Court for the District of Utah, alleging diversity of citizenship. ("McGovern"). The McGovern defendants filed a motion to dismiss on December 8, 1988. Christensen v. Ward, et al., was filed in Utah State Court on September 7, 1988 and removed by the federal defendants On October 12, 1988, pursuant to 28 U.S.C. secs. 1442(a)(1) and 1442 (a)(3). ("Ward"). The Ward complaint names as defendants various, judges magistrates and attorneys allegedly residing in the State of Utah. After the cases were assigned by designation to a non-party judge, Chief Judge Jenkins joined the other Ward defendants by filing his own motion to dismiss on

March 8, 1989. Argument on the motions to dismiss, and on plaintiff's motion for summary judgment in McGovern, was heard in Salt Lake City, Utah.

During oral argument on the pending motions, plaintiff again renewed his motion to remand Ward to state court. In two previous orders, we found that removal of the Ward case was proper. See Christensen v. Ward, et al., No. 88-C-0934-J, slip ops. (D.Utah March 24, 1989, May 5, 1989). The motion is again denied. By invoking the jurisdiction of the federal court to hear claims against a federal officer, a federal officer does not waive the right to question the effect of immunity doctrine on subject matter jurisdiction. Minnesota v. United States, 305 U.S. 382, 388-89 (1939); Special Prosecutor of the State of New York v. United States Attorney, 375 F.Supp. 797, 801 (S.D.N.Y. 1974). Defendants may properly question the gen-

eral authority of any court to grant the relief sought without undermining their right to have immunity defenses determined in federal court. See Mesa v. California, 109 S.Ct. 959 (1989) (distinguishing removal and subject matter jurisdiction). The matter is properly before this court and motions to dismiss filed in both cases are ripe for determination.

In this joint memorandum opinion and order, we find, beyond a reasonable doubt, that neither complaint states claims which entitle plaintiff to relief against any defendant. Both complaints must be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I.

Constitutionality of Immunity Doctrine

In both cases, each defendant relies on the doctrine of official, judicial, or prosecutorial immunity as grounds to dismiss plaintiff's claims. Plaintiff contends

that immunity defenses are unconstitutional. Plaintiff relies on select provisions of the Constitution and Declaration of Independence as the basis for his position. Plaintiff contends (1) immunity doctrine is court-made law, and thus can not be applied to divest rights conferred by the constitution since the authority to legislate is vested in Congress, and (2) the common law doctrine has no foundation in the constitution and is in conflict with constitutional guarantees that all men are entitled to equal protection and due process in regard to privileges and immunities, citizens shall be afforded access to the courts to redress grievances and injuries and that plaintiff is entitled to due process of law.

Although a pro se plaintiff's pleadings and arguments are to be liberally construed, plaintiff has cited no authority in support of the proposition that common

law immunity doctrine is unconstitutional.[2] To the contrary, courts have held otherwise. Furthermore, Congress recently codified the doctrine of absolute immunity, reversing the Supreme Court authority which held that certain acts of government employees are entitled to the lesser protection of qualified immunity. See Robinson v. Egnor, 699 F.Supp. 1207, 1214 (E.D.Va. 1988); 28 U.S.C. sec. 2679 (b)(1) (as amended); Federal Employees

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[2]Plaintiff misinterprets language from Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), to support the proposition that a federal employee's office alone does not discharge him of the responsibility to obey the law. Marbury does not suggest that executive officers should be held liable in tort for "illegal" acts. Marbury guarantees that if the defendants in this case had indeed acted illegally, the federal courts before whom the tax matters were plead, and by whom they were ultimately enforced, had the authority to deny the government's right to proceed against plaintiff or his assets. Those courts reviewed the matter and approved the government's conduct. Defendant has thus received his rights under Marbury.

Liability Reform and Tort Compensation Act of 1988, Pub. L. 100-694, sec. 5, 102 Stat. 4563, 4564 ("Reform Act").

The Reform Act provides that whenever an employee of the United States is sued as an individual in common law tort for acts committed within the scope of their employment, the exclusive remedy is against the United States. 28 U.S.C. sec. 2679(b)(1) (as amended); see also Newman v. Soballe, No. 87-6097, slip op. [1989 U.S.App.LEXIS 5656, 5606-5] (April 27, 1989). The statute is designed to confer personal immunity from tort liability upon that class of federal employees who are not protected by other statutes and whose functions would not be viewed as "discretionary" under the principles of Westfall v. Erwin, 484 U.S. 292 (1988). Newman v. Soballe, 1989 U.S. App.LEXIS at 5606-5; Robinson, 699 F.Supp. at 1214-15. As to such employees, the

statute provides for the substitution of the United States as the appropriate defendant where sovereign immunity is otherwise waived under the Federal Tort Claims Act. 28 U.S.C. sec. 2679(d)(1) (as amended). The express terms of the statute and the legislative history demonstrate that the statute is designed to have retroactive effect on cases filed and claims arising prior to its enactment November 18, 1988. Midland Nat'l Bank v. Conologue, No. 83-1707-K, slip op. [1989 U.S.Dist. LEXIS 3381, 3381-4] (D.Kan. March 22, 1989); Reform Act, Pub. L. 100-694, sec. 8 (Effective Date), 102 Stat. 4563, 4564 (Nov. 18, 1988). The statutory immunity extends to employees of the executive departments, and the judicial and legislative branches of the federal government. 28 U.S.C. sec. 2671 (as amended). The statute also recognizes and adopts the common law of judicial and legislative

immunity as defenses available to the United States as a substitute defendant. 28 U.S.C. sec. 2674 (as amended). Plaintiff's contention that the doctrine of immunity is unconstitutional unless enacted by Congress has been rendered moot by the statute.

The Constitution does not create a fundamental right to pursue specific tort actions. Logan v. Zimmerman Brush Co., 455 U.S. 422, 432-33 (1982); Edelstein v. Wilentz, 812 F.2d 128, 131 (3d Cir. 1987). The Open Access Clause of the First Amendment, providing citizens with the right to redress grievances, focuses on procedural impediments to the exercise of existing rights and does not prevent a court from holding that a plaintiff has no remedy at law for the injuries he may allege. Bowman v. Niagara Machine and Tool Works, Inc., 832 F.2d 1052, 1054 (7th Cir 1987)

(constitution guarantees access rather than success); Doe v. Schneider, 443 F. Supp. 780, 788 (D.Kan. 1978).

In terms of equal protection and due process the common law doctrine of immunity is not unconstitutionally arbitrary and capricious. The distinction between governmental and non-governmental defendants, and the doctrine of immunity itself, are rationally related to the substantial governmental interest in allowing judges, prosecutors, and government agents to serve effectively by concentrating on the business of government unfettered by the threat of burdensome personal litigation as a result of their decisions. Reform Act, Pub. L. 100-694, sec. 2 (Findings and Purposes), 102 Stat. 4563, 4564 (Nov. 18, 1988); see also Edelstein v. Wilentz, 812 F.2d 128, 132 (3d Cir. 1987) (immunity rules adopted by state supreme

court in bar disciplinary proceedings); Daughtry v. Arlington County, Va., 490 F.Supp. 307, 313 (D.D.C. 1980) (challenge to absolute immunity by police officers afforded only qualified immunity).

Official immunity is a necessary extension of the doctrine of sovereign immunity, protecting officials sued as individuals for acts taken under the authority of the sovereign. See Gilbert v. DaGrossa, 756 F.2d 1455 (9th Cir. 1985). The doctrine of sovereign immunity is inherent in the status of the government as a sovereign. Heller v. United States, 776 F.2d 92, 98 (3d Cir. 1985), cert. denied, 476 U.S. 1105 (1986); see Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871) (judicial immunity, deeply rooted in the precedent of common law countries, is

applicable in federal courts). Because the doctrine of immunity is inherent in the status of the government as sovereign, we reject plaintiff's contention that it must be founded on specific passages of the Constitution.

Accordingly, we find that the doctrine of sovereign immunity, as embodied in the common law and the Reform Act, is constitutional. If applicable to these cases, the doctrine will not deny plaintiff any rights guaranteed by the Constitution of the United States.

II.

Christensen v. Ward, et al.

Defendants have filed two motions to dismiss. Defendants assert procedural and jurisdictional grounds for dismissal. Plaintiffs pro se complaint is reviewed by a cautious standard of whether "it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support

of his claim which will entitle him to relief." Haines v. Kerner, 404 U.S. 519, 520-21 (1972).

A. Procedural Grounds for Dismissal.

Defendants contend that various defects in service of process and pleading entitle them to dismissal pursuant to provisions of Rule 12(b) of the Federal Rules of Civil Procedure. The alleged defects relate to (1) service of process in actions against the United States or its officers, pursuant Rule 4(d), and (2) pleading in compliance with the short and plain statement of the facts requirement of Rule 8(d). Plaintiff responds that federal pleading and service standards should not apply to his complaint since Ward was initiated in state court under the Utah Rules of Civil Procedure. Because we find other grounds to resolve the matter, we need not address the issue.

B. Failure to State a Claim.

Defendants contend that the case must be dismissed for failure to state a claim upon which relief can be granted. The government contends that each category of defendants--federal judges, federal prosecutors, and employees of the Internal Revenue Service ("IRS")--are absolutely immune from suit in the nature of that alleged in the complaint.

1. Immunity of Federal Judges and Magistrates.

Six of the defendants in the Ward case are alleged to have negligently researched the law while presiding over matters related to the seizure of real property, farm equipment, and 1293 silver dollars. The judicial defendants are Chief Judge Jenkins, Judge Winder, Judge Sam, Magistrate Gould, Magistrate Alsup, and Magistrate Boyce, all of the United States District Court

for the District of Utah.[3]

Under the common law, judges are absolutely immune from suit on any claim based in the conduct of their office, including allegations that a decision is erroneous, malicious, or in excess of their judicial authority. Stump v. Sparkman, 435 U.S. 349, 356-57 (1978); Van Sickle v. Holloway, 791 F.2d 1431, 1435-36 (10th Cir. 1986). The immunity attaches if (1) the acts complained of are judicial in nature, and (2) the court had jurisdiction over the subject matter of the case. Id. The standard remains applicable to judicial defendants under the Reform Act. 28 U.S.C. secs. 2671, 2674 (as amended).

In Ward, the acts complained of are judicial in nature. The complaint challenges the care used in performing the

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[3]A catalogue of the events giving rise to this litigation and each defendant's role in those events is set out in the appendix to this opinion.

duties of federal judges, alleging defendants were negligent in researching the law applicable to plaintiff and his tax situation. See Van Sickle v. Holloway, 791 F.2d 1431, 1435-36 (10th Cir. 1986).

The acts complained of occurred during proceedings within the jurisdiction of the United States District Court for the District of Utah. 28 U.S.C. sec. 1340 provides district courts original jurisdiction over any civil matter arising under the Internal Revenue Code. 28 U.S.C. sec. 1345 provides district courts original jurisdiction over any action commenced by the United States, unless otherwise provided by Congress. Rather than limiting that jurisdiction, sec. 7402(a) of the Internal Revenue Code, Title 26, specifically confers jurisdiction on the district court over the issuance of orders, process and judgments under the tax code.

As to claims against Chief Judge Jenkins,

even if we accept plaintiff's contention that the matter was in the nature of a criminal penalty, the seizure action was not beyond the subject matter jurisdiction of the federal courts. It is well settled that federal district courts have exclusive jurisdiction under 18 U.S.C. sec. 3231 for crimes established by the provisions of the Internal Revenue Code, Title 26. United States v. Tedder, 787 F.2d 540, 542 (10th Cir. 1986); United States v. Koliboski, 732 F.2d 1328, 1329-30 (7th Cir. 1984); United States v. Drefke, 707 F.2d 978, 980-81 (8th Cir.), cert. denied sub nom, 464 U.S. 942 (1983). Plaintiff's interpretation of the Revision Notes to the various statutes is unpersuasive.

The judicial defendants are absolutely immune from liability for the injuries alleged to have resulted from their conduct in presiding over matters

related to plaintiff's responsibilities under the tax code. The applicable law demonstrates beyond a reasonable doubt that plaintiff can prove no set of facts which would entitle him to relief for this judicial conduct. As against these defendants, the complaint must be dismissed for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6).

2. Immunity of Federal Prosecutors.

Five of the defendants in the Ward case are alleged to have negligently researched the law while representing the United States in matters related to the assessment of plaintiff's tax liability, and the seizure of real property, farm equipment, and 1293 silver dollars. United States Attorney Ward, Assistant United States Attorneys Campbell and Ryan represented the government before the United States District Court. IRS Attorneys Durfee and Jones

represented the government in proceedings before the United States Tax Court.[4]

Judicial immunity also protects attorneys presenting matters before the court from liability for conduct necessary to the normal advocacy function. Butz v. Economou, 438 U.S. 478, 512 (1978). These immunities extend to trial preparation and other "activities intimately associated with the judicial phase" of the advocacy process. Imbler v. Pachtman, 424 U.S. 409, 430 (1976). Accordingly, the two part test for judicial immunity shifts only slightly in this context--government attorneys are absolutely immune if (1) the actions complained of are intimately associated with the judicial phase of the advocacy process,

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[4]A catalogue of the events giving rise to this litigation and each defendant's role in those events is set out in the appendix to this opinion.

and (2) the attorney had duty to bring such prosecution. Murphy v. Morris, 849 F.2d 1101, 1104-05 (8th Cir. 1988); Barr v. Abrams, 810 F.2d 358, 361 (2d Cir. 1987); Lerwill v. Joslin, 712 F.2d 435, 437-41 (10th Cir. 1983).[5]

The complaint challenges the care used in performing the duties of federal government attorneys, alleging defendants were negligent in researching the law applicable to plaintiff and his tax situation. Preparation and research of legal arguments presented in tax related hearings, including the determination of a tax assessment, are necessary to the advocacy function.

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[5]We review plaintiff's claims under the common law doctrine, although the standards applicable to federally employed attorneys under the Reform Act may afford broader protection. See Robinson v. Egnor, 699 F. Supp. 1207, 1215 (E.D.Va. 1988) (employee immune if conduct at issue (1) bears some reasonable relationship or connection to the officials duties and responsibilities, and (2) is not manifestly or palpably beyond officials authority).

Murphy 849 F.2d at 1104-05; Lerwill, 712 F.2d at 437-41.

Internal Revenue Service enforcement actions are within the prosecutorial responsibilities of United States Attorneys. Rylander v. Defendants, 80-1 U.S.T.C. para. 9141, 83 at 128 (E.D.Cal. 1979). Internal Revenue Service attorneys are authorized to practice before the United States Tax Court. Plaintiff's assertion that the Tax Court lacks constitutional jurisdiction over individual tax liability is without merit. Sparrow v. Commissioner, 748 F.2d 914, 915 (4th Cir. 1984) (citing cases and applying standards of Northern Pipeline); Crain v. Commissioner, 737 F.2d 1417, 1417-18 (5th Cir. 1984); Knighten v. Commissioner, 705 F.2d 777, 778 (5th Cir.), cert. denied, 464 U.S. 897 (1983).

The applicable law demonstrates beyond a reasonable doubt that plaintiff

can prove no set of facts which would entitle him to relief against these government attorneys for negligence in conduct necessary to the advocacy function. Accordingly, claims against the United States Attorney, the Assistant United States Attorneys, and the IRS attorneys must be dismissed. Plaintiff has failed to state claims upon which relief may be granted. Fed.R.Civ.P. 12(b)(6).

3. Immunity of Internal Revenue Service Agents.

Although the complaint is unclear in regard to the specific proceedings out of which the alleged liability arises, plaintiff asserts claims against six employees of the Internal Revenue Service. The IRS defendants are District Director Fay, and "IRS employees" Pecorella, Pritchett,

Jernigan, Mayhew, and Packard.[6]

Defendants contend that they are absolutely immune from suit on each of the discretionary functions described in the complaint. See Westfall v. Irwin, 484 U.S. 580 (1988). We agree. In light of the Reform Act and the statutory abolition of the distinction between absolute and qualified immunity as applied to federal employees, it is unnecessary to determine whether the functions of which plaintiff complains are discretionary or ministerial. See Yalkut v. Gemignani, No. 88-6167, slip op. [1989 U.S.App.LEXIS

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[6]A catalogue of the events giving rise to this litigation and each defendants' role in those events is set out in the appendix to this opinion.

5447, 5447-7-8] (2d Cir. April 18, 1989).[7]

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[7]Defendants would be entitled to qualified immunity for the non-discretionary acts alleged if the doctrine remained applicable. Activities in the nature of assessments and the making of levies are discretionary in nature. See David v. Cohen, 407 F.2d 1268 (D.C.Cir. 1969) (decided prior to Westfall). Enforcement of warrants is not a discretionary function. Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982); Pierson v. Ray, 386 U.S. 547, 555 (1967) (police officers); see also Strothman v. Gefreh, 739 F.2d 515, 518 (10th Cir. 1984) (enforcement of a mandatory duty at an operational level not discretionary); Barton v. United States, 609 F.2d 977, 979 (10th Cir. 1979) (discretionary duty requires official to act without reliance on fixed or readily ascertainable standard). If the seizure of personal and real property pursuant to court order is viewed as a non-discretionary act akin to the enforcement of a warrant, defendants would be qualifiedly immune because the complaint does not allege the seizures were made in bad faith or without reason to believe the seizures were legal. Barr v. Abrams, 810 F.2d 358, 361 (2d Cir. 1987); Cameron v. IRS, 773 F.2d 126, 128 (7th Cir. 1985). Although ambiguous, the best case alleged in the complaint is that certain IRS defendants seizing property acted to enforce the petitions or warrants approved by the judicial defendants. These agents would have reason to believe their actions were lawful.

The complaint seeks damages for breach of an agency official's duty to faithfully execute and research the law applicable to plaintiff's tax liability, and the assessments, levies and seizures effected against him. Under the Reform Act, IRS employees are absolutely immune from monetary damages arising from common-law torts causing personal injury or loss of property. Id., 1989 U.S.App.LEXIS at 5447-5; 28 U.S.C. sec. 2679(b)(1) (as amended). Whether an act is included within the scope of an IRS agent's employment is subject to a broad test of whether the conduct at issue: (1) bears some reasonable relationship or connection to the officials duties and responsibilities, and (2) is not manifestly or palpably beyond the official's authority. Yalkut v. Gemignani, No. 88-6167, slip op. [1989 U.S.App.LEXIS 5447, 5447-8] (2d Cir. April 18, 1989); Robinson v. Egnor, 699 F.Supp. 1207, 1215 (E.D.Va. 1988); see also

Nietert v. Overby, 816 F.2d 1464, 1466 (10th Cir. 1987) (absolute immunity standards prior to the Reform Act).

Acts of which plaintiff complains are clearly related to the official duties and responsibilities of the IRS defendants. Decisions to initiate, prosecute or continue proceedings such as audits and assessments are the official duties of IRS agents. Ringer v. Basile, 645 F.Supp. 1517, 1527 (D.Colo. 1986); see Bothke v. Fluor Engineers & Constructors, Inc., 713 F.2d 1405 (9th Cir. 1983) (absolute immunity for interpretive application of tax regulations); Jackman v. D'Agostino, 669 F.Supp. 43, 46 (D.Conn. 1987); Chamberlaine v. Krysztof, 617 F.Supp. 491, 493 n.3 (N.D.N.Y. 1985). The authority to collect assessed taxes by levy is specifically delegated to IRS agents. Yalkut v. Gemignani, No. 88-6167, slip op. [1989 U.S.App.LEXIS 5447, 5447-8] (2d Cir. April

18, 1989) (citing relevant statutes and regulations).

The acts were not manifestly or palpably beyond the authority of the IRS defendants. The agent's decisions were confirmed upon review by the judicial defendants. Ringer v. Basile, 645 F. Supp. 1517, 1527 (D.Colo. 1986) (absolute immunity for prosecution of audits and assessments especially applicable where the prosecution is later subject to litigation). Furthermore, plaintiff does not allege that the methods applied by the agents were unique or aberrational, but that the agent's negligence failed to disclose the fact that the methods did not apply to him as a non-taxpayer. IRS agents have the authority to assess and collect taxes and these agents acted within that authority by applying established procedures for that purpose. See United States v. Tender,

787 F.2d 540, 541 (10th Cir. 1986); Yalkut, 1989 U.S.App.LEXIS 5447-8.

We reject plaintiff's contention as to these and all other defendants that the power to do "injury" to an individual lies beyond the scope of any federal employee's authority. The analysis focuses on the nature of the conduct giving rise to the alleged injury and not on the fact that injury has been a result. See Mesa v. California, 109 S.Ct. 959 (1989); Westfall v. Irwin, 484 U.S. 292 (1988).

Defendants also contend that if plaintiff's complaint could be construed in any way to allege constitutional torts, such torts are not cognizable against the IRS defendants. See Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (federal officials may be liable for violations of constitutional rights). As a general proposition, constitutional tort remedies are not available against IRS agents be-

cause such claims would interfere with the effective functioning of the specific statutory remedies provided for actions against the agency. See Bush v. Lucas, 462 U.S. 367, 388-90 (1983); Cameron v. I.R.S., 773 F.2d 126, 128 (7th Cir. 1985). Specific statutory analysis is unnecessary, however. Federal agents are immune from suit under a Bivens action when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Assessment and levy pursuant to statutory procedures and subject to judicial review do not violate any clearly established right to due process. Yalkut v. Gemignani, No. 88-6167, slip op. [1989 U.S.App.LEXIS 5447-11] (2d Cir. April 18, 1989) (citing cases). A Bivens action may not lie on allegations like those of plaintiff that an IRS agent made

a mistake of law. Flank v. Sellers, 661 F.Supp. 952, 954-55 (S.D.N.Y. 1987).

The applicable law and the agents' reliance on the review and orders of the court demonstrates beyond a reasonable doubt that plaintiff can prove no set of facts which would entitle him to relief for this judicial conduct. Each IRS defendant is absolutely immune from suit on the conduct alleged. Claims against the District Director and employees of the Internal Revenue Service are dismissed for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6).

III.

Christensen v. McGovern, et al.

Claims alleged in plaintiff's second complaint are more difficult to discern than those alleged against the Ward defendants. Plaintiff asserts general allegations against several defendants for prosecuting and presiding over criminal and

civil litigation regarding his tax liabilities. Plaintiff brings the case in diverrity, alleging common law liability against justices of the United States Supreme Court, judges of the United States District Court for the Western District of Washington, of the United States Tax Court, and of the Courts of Appeals for the Ninth and Tenth Circuits.[8] Plaintiff also brings claims against various government attorneys prosecuting matters before these courts. The common thread of the complaint is that each party is alleged to have negligently researched the law, breaching their duties to fully and faithfully execute the law, and injuring plaintiff through the denial of rights to tranquility, property, etc. Plaintiff alleges that proper research would have disclosed

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[8]A catalogue of the events giving rise to this litigation and each defendants' role in those events is set out in the appendix to this opinion.

the fact that plaintiff was not required to pay tax on certain income.

Defendants present four grounds for dismissal: (1) improper service of process, (2) lack of subject matter jurisdiction due to sovereign immunity, (3) failure to state a claim due to judicial and prosecutorial immunity, and (4) failure to comply with short and plain statement of facts requirement of Rule 8(a). Plaintiff responded to the motion by moving for summary judgment against defendants. The motion refers to transcripts, pleadings, and orders of the several courts from which this matter arises.

Plaintiff's motion for summary judgment is denied. Plaintiff's arguments and submissions do not establish that he is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56.

A. Procedural Grounds for Dismissal.

As to dismissal for insufficient service

of process, plaintiff contends (1) service of process is moot because defendants have voluntarily appeared through the United States Attorney, and (2) service on the United States was not required because defendants are sued as individuals, not in their official capacity.

Unlike the Ward complaint, the Federal Rules apply to this action, originating in federal court. We agree that the complaint states claims against certain defendants in their official capacities, and that failure to serve the government pursuant to Rule 4(d) divests this court's subject matter jurisdiction over those claims. See Stafford v. Briggs, 444 U.S. 527 (1980); Dugan v. Rank, 372 U.S. 609, 620 (1963); Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985); Allen v. United States, 630 F.Supp. 367, 373 (D.Kan. 1984); Davis v. Federal Deposit Ins. Corp., 369 F.Supp. 277 (D.Colo. 1974). Nonetheless, we have

reviewed the complaint on other grounds to fully dispose of the issues raised in the motion to dismiss.

B. Failure to State a Claim.

The parties basically set forth the same arguments as discussed above in regard to the immunity defenses.

1. Immunity of United States Justices and Judges.

As to the Justices and Judges named in the complaint, the complaint alleges that each negligently researched, interpreted or applied the law applicable to petitions before the respective courts over which they preside. The acts complained of were judicial in nature and within the colorable jurisdiction of those courts. As discussed above, the judicial defendants are immune from allegations that their conduct caused injury, even if plaintiff had alleged that the conduct was erroneous or malicious. Stump v. Sparkman, 435 U.S.

349, 356-57 (1978); Van Sickle v. Holloway, 791 F.2d 1431, 1435 (10th Cir. 1986).

As discussed above, plaintiff's assertion that 18 U.S.C. sec. 1345 does not confer jurisdiction over the criminal tax case against him on the United States District Court for the Western District of Washington is without merit. See United States v. Tedder, 787 F.2d 540 (10th Cir. 1986); United States v. Koliboski, 732 F.2d 1328, 1329-30 (7th Cir. 1984); United States v. Drefke, 707 F.2d 978, 980-81 (8th Cir.), cert. denied sub nom, 464 U.S. 942 (1983). Similarly, plaintiff's assertion that Judge Korner lacked jurisdiction because the Tax Court is not a constitutional court with jurisdiction over his tax liability is also without merit. See Sparrow v. Commissioner, 748 F.2d 914, 915 (4th Cir. 1984) (citing cases and applying standards of Northern Pipeline); Crain v. Commissioner, 737 F.2d

1417, 1417-18 (5th Cir. 1984); Knighten v. Commissioner, 705 F.2d 777, 778 (5th Cir.), cert. denied, 464 U.S. 897 (1983).

The judicial defendants are absolutely immune for their conduct relating to plaintiff's tax matters. The applicable law demonstrates beyond a reasonable doubt that plaintiff can prove no set of facts which would entitle him to relief for this judicial conduct. Claims alleged against them are dismissed for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6).

2. Immunity of Federal Prosecutors.

The immunity afforded the judicial defendants extends to each of the attorney defendants named in the McGovern complaint. The complaint alleges negligence in activities within the authority of United States Attorneys, Department of Justice attorneys, and IRS attorneys. Preparation and research of legal arguments presented in tax re-

lated hearings, be they before the district court or before the Tax Court, are necessary to the advocacy function. See Murphy v. Morris, 849 F.2d 1101, 1104-04 (8th Cir. 1988); Lerwill v. Joslin, 712 F.2d 435, 437-41 (10th Cir. 1983); Rylander v. Defendants, 80-1 U.S.T.C. para. 9141, 83 at 128 (E.D.Cal. 1979).

The applicable law demonstrates beyond a reasonable doubt that plaintiff can prove no set of facts which would entitle him to relief for conduct necessary to the normal advocacy function. Accordingly, claims against United States Attorneys, Assistant United States Attorneys, Department of Justice attorneys, and IRS attorneys must be dismissed because plaintiff has failed to state claims upon which

relief may be granted. Fed.R.Civ.P. 12 (b)(6).[9]

For the reasons stated above, the McGovern case is dismissed pursuant to Rules 12(b)(1), (5) and (6) of the Federal Rules of Civil Procedure.

IV.

Cross Motions for Sanctions

Motions filed in both cases by plaintiff and defendants incorporate motions for sanctions pursuant to Rule 11 of the

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[9]We have again reviewed plaintiff's claims under the common law doctrine, although the standards applicable to federally employed attorneys under the Reform Act may afford broader protection. See Robinson v. Egnor, 699 F.Supp. 1207, 1215 (E.D.Va. 1988) (employee immune if conduct at issue (1) bears some reasonable relationship or connection to the officials duties and responsibilities, and (2) is not manifestly or palpably beyond officials authority).

Federal Rules of Civil Procedure.[10] All motions for sanctions are denied. In the circumstances of this litigation, we find that an award of sanctions is not necessary at this time.

By denying defendants' motion for sanctions, we do not condone plaintiff's prosecution of either complaint. Mr. Christensen continues to complain of the manner in which his responsibilities under the tax code were determined by the Internal Revenue supervisors and employees and adjudicated through criminal and civil litigation in the federal courts. Mr.

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[10]Rule 11 provides for the imposition of sanctions upon motion or the court's own initiative if a signed pleading is not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law or interposed for an improper purpose, like harassment, unnecessary delay, or needless increase in the cost of litigation.

Christensen has been provided a full and fair opportunity to litigate his rights and defenses in the original actions from which these complaints arise. Allegations that each of the defendants was negligent in their research of the law are at best allegations that the courts reviewing those matters made mistakes of law. The judiciary has provided Mr. Christensen with a full and fair opportunity to pursue those grievances through the appellate process. Neither the Constitution nor other authorities provide trial courts authority to hear original actions in the nature of an appeal. See Atkinson v. O'Neil, 867 F.2d 589, 590 (10th Cir. 1989); Anderson v. Colorado, 793 F.2d 262, 263 (10th Cir. 1986); Van Sickle v. Holloway, 791 F.2d 1432, 1437 (10th Cir. 1986). The rules of immunity go directly to protecting judges from suits like those brought by Mr. Christensen.

Mr. Christensen's approach to this litigation indicates that his grievances and law suits will continue to include new judges and government attorneys as each case is decided against him. Mr. Christensen attempts to create law to relieve the burden of penalties he views as unjustly imposed. He wildly contends that his interpretation of statutes and case law is correct and that the various Supreme Court Justices and other federal judges reviewing his positions are wrong. Mr. Christensen creates legal theories without support of precedent while chastising lawyers and judges for following actual precedent. Although this court has decided against sanctions, plaintiff is edging toward the line where sanctions are warranted for frivolous, insupportable suits. Courts do not hesitate to impose sanctions on frivolous prosecution by pro se plaintiffs. See Atkinson v. O'Neil,

867 F.2d 589, 590 (10th Cir. 1989); Patterson v. Aiken, 841 F.2d 386 (11th Cir. 1988); Doyle v. United States, 817 F.2d 1235, 1236-38 (5th Cir.), cert. denied sub nom, 108 S.Ct. 159 (1987); Stafford v. Commissioner, 805 F.2d 893, 894-95, 805 F.2d 895, 895-96 (10th Cir. 1986); Becker v. N.L.R.B., 678 F.Supp. 406 (E.D.N.Y. 1987); Peth v. Breitzmann, 611 F.Supp. 50 (D.Wis. 1985); Young v. I.R.S., 596 F.Supp. 141 (D.Ind. 1984); McKeown v. LTV Steel Co., 117 F.R.D. 139 (N.D.Ind. 1987).

ORDER

IT IS HEREBY ORDERED that defendants' motions to dismiss, filed in Christensen v. Ward, et al., Civil Action No. 88-C-0934-J, on December 13, 1988 and March 8, 1989, are GRANTED; the complaint and all claims stated therein are DISMISSED WITH PREJUDICE; it is further

ORDERED that plaintiff's motion for summary judgment, filed in Christensen v. McGovern, et al., Civil Action No. 88-C-0883-G, on December 21, 1988, is DENIED; it is further

ORDERED that defendants' motion to dismiss, filed in Christensen v. McGovern, et al., Civil Action No. 88-C-0883-G, on December 8, 1988, is GRANTED; the complaint and all claims stated therein are DISMISSED WITH PREJUDICE; it is further

ORDERED that cross motions for sanctions filed in each case as part of the various pending motions are DENIED,

plaintiff and the government to bear their own costs;

The Clerk of the Court is directed to enter appropriate judgments in accordance with this order.

Done this 1 day of June, 1989 at Denver, Colorado.

BY THE COURT:

Sherman G. Finesilver,
Chief Judge
United States District Court
Sitting By Designation

Copies mailed to counsel 6/5/89; mw

Edward D. Christensen, Pro Se
Glen R. Dawson, AUSA
Philip E. Blondin, Esq.

APPENDIX

Catalogue of Events and Defendants[11]

Christensen v. Ward, et al.

Events

- 1979 Tax Court Action to Establish Tax Liability
- 1982 Tax Court Deficiencies Assessment
- 1983 Action to Seize 1293 Silver Dollars
- 1984 Action to Seize Property
- 1986 Civil Action to Foreclose on Real Property

Defendants and Alleged Participation

Brent D. Ward - United States Attorney District of Utah
- 1983 suit resulting in falsely imposed fine
- 1984 suit on false levy resulting in loss of over $200,000 in property
- 1986 seizure action resulting in loss of home and farm based on false document

C. William Ryan - Assistant United States Attorney District of Utah
- 1984 suit on false levy resulting in loss of over $200,000 in property

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[11]In preparing these tables, we have attempted to compile information contained in the pleadings and supplemental materials supplied in support of plaintiff's motion for summary judgment in McGovern. Some of the dates and appearances may reflect inaccuracies or ambiguities in those materials.

Tena Campbell - Assistant United States Attorney District of Utah
- 1983 suit resulting in falsely imposed fine

Randy G. Durfee - Internal Revenue Service Attorney
- 1979 suit in Tax Court resulting in false determination of tax liability and false seizure of property
- 1982 suit in Tax Court resulting in false determination of tax deficiency and false seizure of property

Richard A. Jones - Internal Revenue Service Attorney
- 1979 suit in Tax Court resulting in false determination of tax liability and false seizure of property

Chief Judge Bruce Jenkins - U.S. District Court District of Utah
- 1983 suit resulting in falsely imposed fine

Judge David K. Winder - U.S. District Court District of Utah
- 1984 suit on false levy resulting in loss of over $200,000 in property

Judge David Sam - U.S. District Court District of Utah
- 1986 seizure action resulting in loss of home and farm based on false document

Magistrate Calvin Gould - U.S. District Court District of Utah
- 1984 suit on false levy resulting in loss of over $200,000 in property

Magistrate Daniel A. Alsup - U.S. District Court District of Utah
- 1983 suit resulting in falsely imposed fine

Magistrate Ronald D. Boyce - U.S. District Court District of Utah
- 1986 seizure action resulting in loss of home and farm based on false document

Carol Fay - Internal Revenue Service District Director, Utah
- Supervision of IRS enforcement activities

D.E. Pecorella - Internal Revenue Agent
- Issued false Certificate of Assessment

Frank Pritchett - Internal Revenue Agent
- Chained and sold farm equipment based on false assessment

Linda S. Jernigan - Internal Revenue Agent
- Chained and sold farm equipment based on false assessment

Lawnie C. Mayhew - Internal Revenue Agent
- Chained and sold farm equipment based on false assessment

Dennis Rees Packard - Internal Revenue Agent
- Chained and sold farm equipment based on false assessment

Christensen v. McGovern, et al.

Events

- 1978 Criminal Trial, Conviction and Imprisonment

- 1982 Tax Court Deficiencies Assessment
- 1986 Motion to Vacate Sentence to Clear Name
- 1986 Motion to Vacate Assessment
- 1986 Civil Action to Foreclose on Real Property

Defendants and Alleged Participation

Chief Judge Walter McGovern - U.S. District Court W.D. Washington
- 1978 wrongful prosecution for failure to file income tax
- 1986 denial of Rule 60 motion for post-judgment relief from sentence brought after sentence served "to clear defendant's good name"

John C. Merkel - United States Attorney W.D. Washington
- 1978 wrongful prosecution for failure to file income tax

David B. Buckey - Assistant United States Attorney W.D. Washington
- 1978 wrongful prosecution for failure to file income tax

Gene S. Anderson - United States Attorney W.D. Washington
- 1986 denial of Rule 60 motion for post-judgment relief from sentence brought after sentence served "to clear defendant's good name"

Robert M. Taylor - Assistant United States Attorney W.D. Washington
- 1986 denial of Rule 60 motion for post-judgment relief from sentence brought after sentence served "to clear defendant's good name"

Judge Clifford J. Wallace - Ninth Circuit Court of Appeals
- Affirmed 1986 denial of Rule 60 motion for post-judgment relief from sentence

Judge Thomas Tang - Ninth Circuit Court of Appeals
- Affirmed 1986 denial of Rule 60 motion for post-judgment relief from sentence

Judge David R. Thompson - Ninth Circuit Court of Appeals
- Affirmed 1986 denial of Rule 60 motion for post-judgment relief from sentence

Judge Jules G. Korner III - United States Tax Court
- 1982 suit in Tax Court resulting in false determination of tax deficiency and false seizure of property
- 1986 denial of motion to vacate assessment after appeal dismissed for failure to prosecute

Michael L. Paup - Department of Justice Tax Division Attorney
- Appeal of 1986 denial of motion to vacate assessment

Judge John P. Moore - Tenth Circuit Court of Appeals
- Affirmed 1986 denial of motion to vacate assessment

Judge Oliver Seth - Tenth Circuit Court of Appeals
- Affirmed 1986 denial of motion to vacate assessment

Judge Wayne E. Alley - Tenth Circuit Court of Appeals
- Affirmed 1986 denial of motion to vacate assessment

Kirk C. Lusty - Internal Revenue Service Attorney
- 1986 seizure action resulting in loss of home and farm based on false document

Edwin Meese III - United States Attorney General
- 1986 seizure action resulting in loss of home and farm based on false document

Chief Justice William H. Rehnquist - United States Supreme Court
- Denied certiorari on 1986 denial of Rule 60 motion for post-judgment relief from sentence
- Denied appeal or certiorari on dismissal for failure to prosecute appeal of 1982 deficiency assessment

Justice Byron R. White - United States Supreme Court
- Denied certiorari on 1986 denial of Rule 60 motion for post-judgment relief from sentence
- Denied appeal or certiorari on dismissal for failure to prosecute appeal of 1982 deficiency assessment

Justice William J. Brennan - United States Supreme Court
- Denied certiorari on 1986 denial of Rule 60 motion for post-judgment relief from sentence
- Denied appeal or certiorari on dismissal for failure to prosecute appeal of 1982 deficiency assessment

Justice Harry A. Blackmun - United States Supreme Court
- Denied appeal or certiorari on dismissal for failure to prosecute appeal of 1982 deficiency assessment

Justice Thurgood Marshall - United States Supreme Court
- Denied certiorari on 1986 denial of Rule 60 motion for post-judgment relief from sentence
- Denied appeal or certiorari on dismissal for failure to prosecute appeal of 1982 deficiency assessment

Justice John Paul Stevens - United States Supreme Court
- Denied certiorari on 1986 denial of Rule 60 motion for post-judgment relief from sentence
- Denied appeal or certiorari on dismissal for failure to prosecute appeal of 1982 deficiency assessment

Justice Anthony Kennedy - United States Supreme Court
- Denied certiorari on 1986 denial of Rule 60 motion for post-judgment relief from sentence
- Denied appeal or certiorari on dismissal for failure to prosecute appeal of 1982 deficiency assessment

Justice Sandra D. O'Connor - United States Supreme Court
- Denied certiorari on 1986 denial of Rule 60 motion for post-judgment relief from sentence
- Denied appeal or certiorari on dismissal for failure to prosecute appeal of 1982 deficiency assessment

Justice Antonin Scalia - United States Supreme Court

- Denied certiorari on 1986 denial of Rule 60 motion for post-judgment relief from sentence
- Denied appeal or certiorari on dismissal for failure to prosecute appeal of 1982 deficiency assessment

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

Civil Action No. 88-C-0934-J

EDWARD D. CHRISTENSEN,

Plaintiff,

v.

BRENT D WARD; C. WILLIAM RYAN; TENA CAMPBELL; RANDY G. DURFEE; RICHARD A. JONES; BRUCE JENKINS; DAVID K. WINDER; DAVID SAM; CALVIN GOULD; DANIEL A. ALSUP; RONALD N. BOYCE; CAROL FAY; D. E. PECORELLA; FRANK PRITCHETT; LINDA S. JERNIGAN; LAWNIE C. MAYHEW; DENNIS REES PACKARD; and JOHN and JANE DOES 1 through 100,

Defendants.

ORDER

Sherman G. Finesilver, Chief Judge[1]

This matter comes before the court on plaintiff's motion to vacate our order of March 24, 1989, which denied plaintiff's objection to defendant's petition for removal. Plaintiff seeks

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[1]United States District Court for the District of Colorado, by designation.

economic and non-economic damages against employees of the Department of Justice and Internal Revenue Service, agencies of the United States of America, and federal Judges and Magistrates of the District of Utah. Plaintiff alleges that defendants are liable for damages caused in the wrongful assessment and prosecution of claims for federal tax. Plaintiff alleges that defendants each breached the constitutional duty to fully and faithfully execute the laws of the United States through negligent research of the law applicable to various levies, assessments, and seizures made against him.

In our order of March 24, 1989, we held that the case was properly removed as falling within the subject matter jurisdiction of the federal courts. See 28 U.S.C. secs. 1442(a)(1) and 1442(a)(3). The action is brought against officers of the United States courts and of United States agencies

having statutory authority to collect revenue, for acts taken under color of office. Willingham v. Morgan, 395 U.S. 402 (1969); Las Cruces v. Baldonado, 652 F.Supp. 138 (D.N.M. 1986); Newlin v. Dickey, Civ. A. No. 89-A-64, slip op. (D.Colo. 1989).

Primarily, plaintiff reasserts his objection to the jurisdiction of this federal court over suits between non-diverse parties arising under state law. These factors do not limit the jurisdictional grant of the federal officers removal statute. See Greenspun v. Schlindwein, 574 F.Supp. 1038, 1041 (E.D.Penn 1983). Although plaintiff denies that defendants' conduct actually falls within their authority, his denial does not preclude removal. Greenspun, 574 F.Supp. at 1041 n.4; see also Willingham v. Morgan, 395 U.S. 402, 407-10 (1969). The complaint alleges that at all relevant times, defendants were bound by the duties of

federal employees "to insure domestic tranquility within the United States" and to "faithfully execute" the laws of the United States." Accordingly, the focus of his complaint is on actions taken under "color of authority."

In the pending motion to vacate, plaintiff also raises several objections to the procedural aspects of removal in this case. Because plaintiff appears on his own behalf, without counsel, we address the additional objections briefly below.

Plaintiff contends that removal was procedurally defective because (1) removal was effected on petition of the United States as defendant although the United States is not a named party to this action, (2) the United States Attorney for the District of Utah and attorneys of the United States Department of Justice may not appear on behalf of the individual defendants to effect removal of a case

between non-diverse citizens of the state of Utah, and (3) the appearance of the United States in this action is a fraudulent attempt to avoid the removal bond requirements of 28 U.S.C. sec. 1446(d).

As to the first point, the pertinent language of statute providing for removal of actions against federal revenue officers and judges provides "A civil action . . . commenced in a State court against any of the following persons may be removed by them." 28 U.S.C. sec. 1442(a). As the government contends, an action against a defendant personally shall be construed as an action against the United States, if the relief sought affects the actions of the defendant in his capacity as a federal employee. See Dugan v. Rank, 372 U.S. 609, 620 (1962); Jackman v. D'Agostino, 669 F.Supp. 43, 46 (D.Conn. 1987). This proposition, arising within the context of sovereign im-

munity, is not wholly dispositive of the government's ability to remove a case in which federal officers and not the United States are named as defendants in the complaint. Our research indicates, however, that the United States frequently petitions for removal of federal officer cases in its own name. See, e.g., Swett V. Schenk, 792 F.2d 1447 (9th Cir. 1986); City of Las Cruces v. Baldonado, 652 F.Supp. 138 (D.N.M. 1986); Newlin v. Dickey, Civ. A. No. 89-A-64, slip op. (D.Colo. 1989). We find this approach to be supported in the law.

Plaintiff relies on the long-standing principle that provisions regulating the procedures for removal are to be strictly applied to insure that the federal courts do not improperly interfere with the jurisdiction of state courts. See Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-09 (1941); Fajen v. Foundation Reserve Ins.

Co., 683 F.2d 331, 333 (10th Cir. 1982). In the context of the federal officer removal statute, however, the United States Supreme Court has cautioned that "the right of removal is absolute for conduct performed under the color of federal office, and has insisted that the policy favoring removal should not be frustrated by a narrow grudging interpretation [of 28 U.S.C. sec. 1442]," Arizona v. Maypenny, 451 U.S. 232, 241 (1981). The primary purpose for the removal statute is to assure that defenses of official immunity applicable to federal officers are litigated in federal court. Willingham v. Morgan, 395 U.S. 402, 406-07 (1969). The rules applicable to federal officer removal provide the court with the discretion to look beyond the complaint and petition to determine whether the action itself should be removed, and to view

the formal wording of the petition as having been amended to reflect the facts established by the record. Willingham, 395 U.S. at 407 n.3; Newlin v. Dickey, Civ. A. No. 89-A-64, slip op. (D.Colo. 1989); Greenspun v. Schlindwein, 574 F.Supp. 1038, 1040 n.3 (E.D.Penn 1983); see also Buell v. Sears, Roebuck & Co., 321 F.2d 468, 471 (10th Cir. 1963) (permitting amendment of petition post-trial to conform to evidence).

Interpreting the petition for removal of this action in accordance with these liberal rules of construction, it is clear that plaintiff's objection is to form rather than substance. The complaint alleges that defendants were negligent in their research and application of the United States Tax Code and regulations promulgated thereunder and that this negligence injured plaintiff, in part, through the wrongful assessment of tax liability

and seizure of property to extinguish that liability. The government's interest in litigating immunity defenses to these claims lies in protecting the vigorous and thorough enforcement of the tax laws by Internal Revenue agents and the federal courts. See Expeditions Unlimited Aquatic Enterprises v. Smithsonian Inst., 566 F.2d 289, 292 (D.C.Cir. 1977). Although not the United States is not a nominal defendant to this action, the action clearly places its position on immunity defenses in issue alongside those of the nominal defendants. See Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985). Accordingly, because the case is removable under the federal officers removal statute, the mere fact that the petition for removal is brought by the United States will not defeat removal. The petition will be read as if amended to state "The United States of America, on behalf of the federal de-

fendants."[2]

The interest of the government in this action is also relevant to plaintiff's second objection to the removal petition. The United States Attorney and attorneys of the Department of Justice have statutory authority to represent federal judges, officers and agencies in actions brought against them as individuals when the Department of Justice determines that the litigation effects interests of the United States. Expeditions Unlimited Aquatic Enterprises v. Smithsonian Inst., 566 F.2d 289, 292 (D.C.Cir. 1977); Brawer v. Horowitz, 535 F.2d 830, 835-36 (3d Cir. 1976); Miller v. Johnson, 541

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[2]Courts are reluctant to remand cases where the nature of the case was clearly removable at the time it was filed, "simply because the drafter of the petition for removal did not draft it as artfully as he might have." Marshall Construction Co. v. M. Berger and Co., 533 F.Supp. 793 799 (W.D.Ark. 1982).

F.Supp. 1165, 1172 (D.D.C. 1982); 28 U.S.C. secs. 516, 517; see also Chamberlain v. Krysztof, 617 F.Supp. 491, 493-94 (N.D.N.Y. 1985) (U.S. Attorney properly represents IRS agents in tort suits arising out of income withholding).

Finally, because of the government's interest and appearance in this litigation, we find that the petition falls within the removal bond exception of 28 U.S.C. sec. 1446(d). The petition was made "in behalf of the United States." Accordingly,

IT IS HEREBY ORDERED that plaintiff's Motion to Vacate Order of March 24, 1989, filed March 30, 1989, is DENIED. Defendants' Petition for Removal, filed October 12, 1988, is GRANTED nunc pro tunc March 24, 1989. The matter is properly before this court and the court will entertain no further motions on the issue of re-

moval.

Done this 5 day of May, 1989, at Denver, Colorado.

BY THE COURT:

Sherman G. Finesilver,
Chief Judge
United States District Court

Copies mailed to counsel 5/9/89; mw

Edward Christensen, Pro Se
Glen R. Dawson, AUSA
Philip E. Blondin, Esq.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EDWARD D. CHRISTENSEN,	)	
	)	
Plaintiff - Appellant,	)	
	)	
v.	)	No. 89-4099
	)	
BRENT WARD, et al,	)	
	)	
Defendants - Appellees.	)	

EDWARD D. CHRISTENSEN,	)	
	)	
Plaintiff - Appellant,	)	

v.) No. 89-4100
)
WALTER T. McGOVERN, et al,)
)
Defendants - Appellees.)

ORDER

Filed June 29, 1990

Before LOGAN, SEYMOUR and ANDERSON, Circuit Judges.

Edward D. Christensen shall show cause in writing within ten days of the date of this order why sanctions should not be imposed on him as described in the order and judgment filed contemporaneously with this order to show cause.

Entered for the Court

ROBERT L. HOECKER, Clerk

By_____
Patrick Fisher, Chief
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EDWARD D. CHRISTENSEN,	)	
	)	
Plaintiff - Appellant,	)	
	)	
v.	)	No. 89-4099
	)	
BRENT WARD, et al,	)	
	)	
Defendants - Appellees.	)	

EDWARD D. CHRISTENSEN,	)	
	)	
Plaintiff - Appellant,	)	
	)	
v.	)	No. 89-4100
	)	
WALTER T. McGOVERN, et al,	)	
	)	
Defendants - Appellees.	)	

ORDER

Filed July 9, 1990

Before LOGAN, SEYMOUR and ANDERSON, Circuit Judges.

To correct the identity of the members of the panel of judges who decided this appeal, the order and judgment and order to show cause issued June 29, 1990, are reissued nunc pro tunc to show the panel members are Judges Logan, Seymour and Anderson. Judge Moore is recused and took no part in consideration or disposition of this appeal.

Entered for the Court

ROBERT L. HOECKER, Clerk

By_____
Patrick Fisher
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EDWARD D. CHRISTENSEN,	)	
	)	
Plaintiff - Appellant,	)	
	)	
v.	)	No. 89-4099
	)	
BRENT WARD, U. S. Attorney;	)	

C. WILLIAM RYAN; TENA CAMPBELL; RANDY G. DURFEE; RICHARD A. JONES; BRUCE JENKINS; DAVID K. WINDER; DAVID SAM; CALVIN GOULD; DANIEL A. ALSUP; RONALD N. BOYCE; CAROL FAY; D. E. PECORELLA; FRANK PRITCHETT; LINDA S. JERNIGAN; LAWNIE C. MAYHEW; DENNIS REES PACKARD, and JOHN and JANE DOES 1 through 100

Defendants - Appellees.

EDWARD D. CHRISTENSEN,

Plaintiff - Appellant,

v. No. 89-4100

WALTER T. McGOVERN; JOHN C. MERKEL; DAVID B. BUKEY; JEAN S. ANDERSON; ROBERT M. TAYLOR; CLIFFORD J. WALLACE; THOMAS TANK; DAVID THOMPSON; EDWIN MEESE, III; KIRK C. LUSTY; JULES G. KORNER, III; JOHN P. MOORE; OLIVER SETH; WAYNE E. ALLEY; MICHAEL L. PAUP; WILLIAM H. REHNQUIST; BYRON R. WHITE; WILLIAM J. BRENNAN; HARRY A. BLACKMUN; THURGOOD MARSHALL; JOHN PAUL STEVENS; ANTHONY M. KENNEDY; SANDRA D. O'CONNOR; ANTONIN SCALIA, and JOHN and JANE DOES 1 through 100,

Defendants - Appellees.

ORDER

Filed August 2, 1990

Before LOGAN, SEYMOUR, and ANDERSON, Circuit Judges.

This matter comes on for consideration of plaintiff-appellant's petition for rehearing filed July 16, 1990.

Upon consideration thereof, the petition is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By_____
Patrick Fisher
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EDWARD D. CHRISTENSEN,)

Plaintiff - Appellant,	)	
	)	
v.	)	No. 89-4099
	)	(D.C. No. 88-
BRENT D. WARD; C. WILLIAM RYAN; TENA CAMPBELL; RANDY G. DURFEE; RICHARD A. JONES; BRUCE JENKINS; DAVID K. WINDER; DAVID SAM; CALVIN GOULD; DANIEL A. ALSUP; RONALD N. BOYCE; CAROL FAY; D. E. PECORELLA; FRANK PRITCHETT; LINDA S. JERNIGAN; LAWNIE C. MAYHEW; DENNIS REES PACKARD, and JOHN and JANE DOES, 1 through 100,	)	C-934)
	)	District of
	)	Utah
	)	
	)	
	)	
	)	
	)	
	)	
	)	
	)	FILED
	)	Aug. 28, 1990
	)	Robert L.
Defendants - Appellees	)	Hoecker, Clerk

EDWARD D. CHRISTENSEN,	)	
	)	
Plaintiff - Appellant,	)	
	)	
v.	)	No. 89-4100
	)	(D.C. No. 88-
WALTER T. McGOVERN; JOHN C. MERKEL; DAVID B. BUKEY; JEAN S. ANDERSON; ROBERT M. TAYLOR; CLIFFORD J. WALLACE; THOMAS TANG; DAVID THOMPSON; EDWIN MEESE, III; KIRK C. LUSTY; JULES G. KORNER, III; JOHN P. MOORE; OLIVER SETH; WAYNE E. ALLEY; MICHAEL L. PAUP; WILLIAM H. REHNQUIST; BYRON R. WHITE; WILLIAM J. BRENNAN; HARRY A. BLACKMUN; THURGOOD MARSHALL; JOHN PAUL STEVENS; ANTHONY M. KENNEDY; SANDRA D. O'CONNOR; ANTONIN	)	C-0883)
	)	District of
	)	Utah
	)	
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	)	
	)	

SCALIA, and JOHN and JANE DOES, 1 through 100,

Defendants - Appellees.

Before LOGAN, SEYMOUR, and ANDERSON, Circuit Judges.

We have considered the response to the order to show cause issued June 29, 1990. Sanctions are imposed as follows: (1) Double costs are awarded in favor of the United States. The clerk shall issue an amended statement of costs. (2) Mr. Christensen is prohibited from filing any complaint in the United States District Court for the District of Utah or any appeal in this court that contains the same or similar allegations to the ones set forth in his complaints and other pleadings in the cases at bar (including any direct or indirect challenge to the previous court proceedings or judgments

referred to in our order and judgment of June 29, 1990). If such an appeal is docketed, the clerk of this court shall institute dismissal proceedings. (3) Mr. Christensen shall pay to the Clerk of the United States Court of Appeals for the Tenth Circuit five hundred dollars ($500.00) as a limited contribution to the United States for the costs and expenses of this action. (4) Mr. Christensen shall not be permitted to pursue further civil appeals in this court until he provides the court with adequate proof of compliance with the sanctions imposed in this case and in Christensen v. Commissioner, No. 87-2158, slip op. (10th Cir. Feb. 24, 1988). See Zerman v. Jacobs, 814 F.2d 107, 109 (2d Cir. 1987); Stelly v. Commissioner, 804 F.2d 868, 871 (5th Cir. 1986); and Schiff v. Simon & Schuster, 766 F.2d 61, 62 (2d Cir. 1985).

Entered for the Court
ROBERT L. HOECKER,
Clerk of Court

by: _____
Patrick Fisher
Chief Deputy Clerk

CONSTITUTIONAL PROVISIONS

ARTICLE III, Sec. 2.

The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction-to Controversies to which the United States shall be a Party;-to Controversies between two or more States;-between a State and Citizens of another State;-between Citizens of different States;-between Citizens of

the same State claiming lands under Grants of different States, and between a State, or Citizens thereof, and foreign States, Citizens or subjects.

ARTICLE VI, Par. 2.

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT ONE

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedon of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMEMDMENT FOUR

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT FIVE

No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT SEVEN

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT TEN

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT NINE

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT THIRTEEN

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted shall exist within the United States or any place subject to their jurisdiction.

AMENDMENT SIXTEEN

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without re- to any sensus or enumeration.

STATUTES

PUBLIC LAW 100-694-NOV. 18, 1988
102 STAT. 4563

An Act

To amend title 28, United States Code, to provide for an exclusive remedy against the United States for suits based upon certain negligent or wrongful acts or omissions of United States employees committed within the scope of their employment, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Employees Liability Reform and Tort Compensation Act of 1988".

SEC. 2. FINDINGS AND PURPOSES.

(a) Findings. - The Congress finds and declares the following:

(1) For more than 40 years the Federal Tort Claims Act has been the legal mechanism for compensating persons injured by negligent or wrongful acts of Federal employees committed within the scope of their employment.

(2) The United States, through the Federal Tort Claims Act, is responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment.

(3) Because Federal employees for many years have been protected from personal common law tort liability by a broad based immunity, the Federal

Tort Claims Act has served as the sole means for compensating persons injured by the tortious conduct of Federal employees.

(4) Recent judicial decisions, and particularly the decision of the United States Supreme Court in Westfall v. Erwin, have seriously eroded the common law tort immunity previously available to Federal employees.

(5) This erosion of immunity of Federal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce.

(6) The prospect of such liability will seriously undermine the morale and well being of Federal employees,

impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts.

(7) In its opinion in Westfall v. Erwin, the Supreme Court indicated that the Congress is in the best position to determine the extent to which Federal employees should be personally liable for common law torts, and that legislative consideration of this matter would be useful.

(b) Purpose. - It is the purpose of this Act to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States.

SEC. 3. JUDICIAL AND LEGISLATIVE BRANCH

EMPLOYEES.

Section 2671 of title 28, United States Code, is amended in the first full paragraph by inserting after "executive departments," the following: "the judicial and legislative branches,".

SEC. 4. RETENTION OF DEFENSES.

Section 2674 of title 28, United States Code, is amended by adding at the end of the section the following new paragraph:

"With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.".

SEC. 5. EXCLUSIVENESS OF REMEDY.

Section 2679(b) of title 28, United States Code, is amended to read as fol-

lows:

"(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

"(2) Paragraph (1) does not extend or apply to a civil action against an employee

of the Government --

"(A) which is brought for a violation of the Constitution of the United States, or

"(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.".

SEC. 6. REPRESENTATION AND REMOVAL.

Section 2679(d) of title 28, United States Code, is amended to read as follows:

"(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party

defendant.

"(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

"(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the

United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

"(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

"(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675 (a) of this title, such a claim shall be

deemed to be timely presented under section 2401(b) of this title if --

"(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

"(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.".

SEC. 7. SEVERABILITY.

If any provision of this Act or the amendments made by this Act or the application of the provision to any person or circumstance is held invalid, the remainder of this Act and such amendments and the application of the provision to any other person or circumstance shall not be affected by that invalidation.

SEC. 8. EFFECTIVE DATE.

(a) General Rule. - This Act and the amendments made by this Act shall take

effect on the date of the enactment of this Act.

(b) Applicability to Proceedings. - The amendments made by this Act shall apply to all claims, civil actions, and proceedings pending on, or filed on or after, the date of the enactment of this Act.

(c) Pending State Proceedings. - With respect to any civil action or proceeding pending in a State court to which the amendments made by this Act apply, and as to which the period for removal under section 2679(d) of title 28, United States Code (as amended by section 6 of this Act), has expired, the Attorney General shall have 60 days after the date of the enactment of this Act during which to seek removal under such section 2679(d).

(d) Claims Accruing Before Enactment. - With respect to any civil action or proceeding to which the amendments made by

this Act apply in which the claim accrued before the date of the enactment of this Act, the period during which the claim shall be deemed to be timely presented under section 2679(d)(5) of title 28, United States Code (as amended by section 6 of this Act) shall be that period within which the claim could have been timely filed under applicable State law, but in no event shall such period exceed two years from the date of the enactment of this Act.

For the years of Christensen's conviction and the assessment against him for alleged taxes. (1972, 1973, 1974, 1975, 1976 and 1977.)

(26 U.S.C.) Sec. 6012 Persons required to make returns of income

(a) General rule.-Returns with respect to income taxes under subtitle A shall be made by the following:

(1)(A) Every individual having for the taxable year a gross income of $750 or more, except that a return shall not be required of an individual (other than an individual referred to in section 142(b)-

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Sec. 142

(b) Certain other taxpayers ineligable.- The standard deduction shall not be allowed in computing the taxable income of-

(1) a nonresident alien individual;

(2) a citizen of the United States entitled to the benefits of section 931 (relating to income from sources within possessions of the United States);

(3) an individual making a return under section 443(a)(1) for a period of less than 12 months on account of a change in his annual accounting period; or

(4) an estate or trust, common trust fund, or partnership.

Sec. 6020. RETURNS PREPARED FOR OR EXECUTED BY SECRETARY.

(b) EXECUTION OF RETURN BY SECRETARY-

(1) AUTHORITY OF SECRETARY TO EXECUTE RETURN.- If any person fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed therefore, or makes, willfully or otherwise, a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.

SEC. 6201. ASSESSMENT AUTHORITY.

(a) AUTHORITY OF SECRETARY.-The Secretary is authorized and required to make the inquires, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue

law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

(1) TAXES SHOWN ON RETURN.-The Secretary shall assess all taxes determined by the taxpayer or by the Secretary as to which returns are made under this title.

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28 U.S.C. Sec. 453 Oaths of justices and judges

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all duties incumbent upon me as _____ according to the best of my abilities and understanding,

agreeably to the Constitution and laws of the United States. So help me God."

---

28 U.S.C. Sec. 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

REGULATIONS AND PROCEDURES

Federal Income Tax Regulation 1.6012-1 (5)

Whenever a return is made by an agent it must be accompanied by a power of attorney (or copy thereof) authorizing him to represent his principle in making, executing, or filing the return.

I.R.S. Delinquent Return Procedures

Sec. 5290 Refusal to File-IRC 6020(b) Assessment Procedure

Sec. 5291 Scope

(1) The procedure applies to employment, excise and partnership tax returns. Generally, the following returns will be involved.

(a) Form 940, Employer's Quarterly Annual Federal Unimployment Tax Return;

(b) Form 941, Employer's Quarterly Federal Tax Return;

(c) Form 942, Employer's Quarterly Tax Return for Household Employees;

(d) Form 943, Employer's Annual Tax Return for Agricultural Employees;

(e) Form 11-B, Special Tax Return- Gambling Defices; (note)

(f) Form 720, Quarterly Federal Excise Tax Return

(g) Form 2290, Federal Use Tax Return on Highway Motor Vehicles;

(h) Form CT-1, Employer's Annual Railroad Retirement Tax Return;

(i) Form 1065, U.S. Partnership Return of income.